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90-1664

Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1990

Ronald Philbrook,
Petitioner,

v.

Ansonia Board of Education and Nicholas Collicelli, Dr. Charles J. Connors, Kenneth Eaton, William Evans, Del Matricaria, Susan Schumacher, Faith Tingley, and Robert E. Zuraw,
Respondents,

Petition For A Writ of Certiorari To The United States Court of Appeals For the Second Circuit

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for Petitioner

QUESTIONS PRESENTED

1. Whether the Court of Appeals violated this Court's instructions on remand when instead of inquiring into the interpretation of Ansonia's leave provisions as this Court directed, it looked only at whether the unambiguous portions of the agreement were enforced.

2. Whether an employer's rule which prohibits use of personal leave for "any religious observance" discriminates on the basis of religion in violation of Title VII.

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PRIOR OPINIONS

The opinion of the Court of Appeals for the Second Circuit on remand is reported at _____ F.2d _____ and is reprinted in the appendix hereto, p.1a, infra. The findings and conclusions of the United States District Court for the District of Connecticut (Murphy, D.J.) have not been reported. They are reprinted in the appendix hereto, p. 19a, infra. The opinion of this Court is reported at 479 U.S. 60 and is reprinted in the appendix hereto, p. 34a, infra. The first opinion of the United States Court of Appeals is reported at 757 F.2d 476 and is reprinted in the appendix hereto, p. 58a, infra. The first Memorandum Decision of the United States District Court for the District of Connecticut is unreported and is reprinted in the appendix hereto, p. 84a, infra.

JURISDICTION

The Opinion of the Court of Appeals was filed on January 25, 1991. The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. Section 1254(1). The jurisdiction of the District Court was based on 28 U.S.C. Sections 1331 and 1343 and 42 U.S.C. Section 2000e-5(f).

STATEMENT OF THE CASE

This case has been before the Court before, Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986), and is now back because, in Petitioner's view, the Court of Appeals misinterpreted the Court's mandate. Petitioner Ronald Philbrook has been a typing and business teacher in Ansonia, Connecticut High School since 1962. In 1968 he joined the Worldwide Church of God, among whose

teachings is the requirement that on certain holy days each year members must attend religious services and refrain from gainful employment. This case arose because Respondent, the Ansonia Board of Education, refused to permit Philbrook to use his contractually allotted personal leave days to observe his religious holy days.

The District Court originally concluded that Philbrook had failed to prove a case of religious discrimination because he had not been placed by the School Board in a position of violating his religion or losing his job. The Court of Appeals for the Second Circuit then reversed, remanding for further findings on the question of reasonable accommodation. 757 F.2d 476 (2d Cir. 1985). This Court rejected the Second Circuit's view of reasonable accommodation under Title VII but

affirmed the judgment remanding for further findings because "there [were] insufficient factual findings as to the manner in which the collective bargaining agreements have been interpreted in order for us to" determine whether the School Board's leave policy reasonably accommodated Philbrook. 479 U.S. at 70. In this Court's view, the reasonableness of the School Board's accommodation turned on whether the personal business leave category defined a "limited purpose leave," or whether it was "not so limited, operating as an open-ended leave provision that may be used for a wide range of secular purposes in addition to those specifically provided for in the contract, but not for similar religious purposes." 479 U.S. at 71. The contracts limited permissible personal leave to those uses not

otherwise specified in the contract, 479 U.S. at 64, but the record was in the Court's view unclear as to whether there were any other limitations on personal leave.

On remand, after an evidentiary hearing, the District Court adopted the School Board's proposed findings and conclusions verbatim, and the Second Circuit affirmed. Although this Court had remanded because there were questions "as to the manner in which the collective-bargaining agreements have been interpreted," 479 U.S. at 70, the Court of Appeals read this Court's mandate as directing it simply to ascertain whether the agreements had been complied with. A. 16a. Finding that they had been, the Court of Appeals affirmed without further addressing the scope of the personal leave provisions.

REASONS FOR GRANTING THE WRIT

The Courts below misread this Court's mandate and accordingly approved an unlawful leave policy. Certiorari should be granted to insure compliance with the Court's remand order.

The vice of Ansonia's personal leave provision is that it prohibits use of personal leave for religious activity because it is religious. As this Court suggested, an employer may give paid leave for specific, defined secular reasons - for example sick leave - without being required to allow that leave also to be used for religious observance. And an employer who gives leave for a legitimate special purpose is entitled to test claims for use of that leave by whether they fit within that purpose. Thus an employee who sought to use sick leave to observe a

religious holiday would be barred, not because his purpose was religious but because it was not for illness. On the other hand, under this Court'sopinion, an employer who gave paid leave (as the Board does) for attendance at weddings could not restrict use of this leave to non-religious wedding ceremonies without violating Title VII.

The question posed by this Court's remand is whether or not the category of personal leave is a broad one that would include religious observance but for the explicitly discriminatory exclusion. The record below plainly established that it is. Other than the purposes specifically excluded by contract, the defendants' own testimony established that the only boundary on the two days of personal leave with approval is that it be for a purpose which is, in the opinion of the

superintendent, "important, having some part in the person's family or personal life." This standard fits exactly the purpose of religious activity and observance for religious people. The personal day at the teacher's discretion need not even meet that criterion: Teachers are permitted to use their discretionary day for purposes which the superintendent would not approve, even for purposes which he has in fact disapproved. And the only limitations on the scope of personal leave found by the district court were the uses for which leave is otherwise provided in the contract.

It is hard to imagine a more convincing answer to the question this Court posed on remand. On this record, it is apparent that personal leave may be used for a "wide range of secular purposes in addition to those

specifically provided for in the contract, but not for similar religious purposes." 479 U.S. at 71. For example, a teacher may take a personal business day for an important family meeting or function with others; for charity work; or to better him or herself through study. The superintendent, and certainly the teacher, could consider each of these activities "important" or "necessary." But for a religious teacher, any of these activities may constitute religious activity or observance. Activities which are permissible personal business may thus become prohibited for the religious teacher solely because his motivation in conducting these activities is religious.

And just as the same activity may be either religious or secular depending on the motivation of the actor, so also

mandated church attendance can serve purposes closely similar to activities which are permitted because they are secular. For a religious observer, mandated attendance at holy day services may be a more effective way to promote family understanding and unity than a secular counseling session, and provide better advice for conducting one's affairs than a visit to a lawyer. It may be the activity which is, in the superintendent's words, the most "important, having some part in the person's family or personal life." In short, on this record the distinction between religious observance or activity, including observance of religious holy days, and at least some forms of important and necessary secular business is simply a distinction based on religion. Philbrook could use his personal leave to attend meetings of the

Ethical Culture Society or the World Humanists, but not to attend his church. The record on remand shows that religious observance is a prohibited use of personal leave because it is religious, not because there is some other way in which the personal leave provision is inapplicable to religious observance. As this Court held, 479 U.S. at 71, the prohibition on the use of personal leave for religious observance is therefore unlawful.

Faced with this factual record, the Second Circuit simply declined to apply the principles this Court directed it to apply. It made no inquiry into the scope of the personal leave provision except to note that, as this Court already found, 479 U.S. at 64, the contract prohibits use of personal leave for uses otherwise specified in the contract. 16a. Instead, the Court of

Appeals changed the question it was directed to address from what the ambiguous portion of the personal leave provision means (what is "necessary personal business"?) to whether the unambiguous portion of the provision (personal leave cannot be used for uses otherwise specified in the contract) is enforced.

This change is wrong: It disregards this Court's mandate and sanctions discrimination in violation of Title VII. The writ should be granted and the decision below reversed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this petition should be granted and a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 538—August Term, 1989

(Argued: November 30, 1989

Decided: January 25, 1991)

Docket No. 89-7726

RONALD PHILBROOK,

Plaintiff-Appellant,

—v.—

ANSONIA BOARD OF EDUCATION, and NICOLAS COLLICELLI, DR. CHARLES J. CONNERS, KENNETH EATON, WILLIAM EAVENS, DEL MATRICARIA, and SUSAN SCHUMACHER (as President), and FAITH TINGLEY (as Secretary), individually and as members of said Board, ROBERT E. ZURAW, individually and as Superintendent of the ANSONIA SCHOOL SYSTEM, and ANSONIA FEDERATION OF TEACHERS, LOCAL 1012, AFL-CIO, and JOSA NEVES, KATHLEEN ROBERTS, MARY GHIRARDINI, DENNIS GLEASON, DOMINICK BROGOLIA, MAUREEN WILKINSON, and GEORGETTE WILLIAMS, individually and as officers of said local,

Defendants-Appellees.

Before:

KEARSE, ALTIMARI, and MAHONEY,
Circuit Judges.

Appeal from findings of fact and conclusions of law of the United States District Court for the District of Connecticut, Thomas F. Murphy, *Judge*, finding collective bargaining agreement as administered not discriminatory with respect to conditions of employment on account of religion.

Affirmed.

DAVID N. ROSEN, New Haven, Connecticut, *for Plaintiff-Appellant.*

THOMAS N. SULLIVAN, Hartford, Connecticut (Robert J. Murphy, Sullivan, Lettick & Schoen, Hartford, Connecticut, of counsel), *for Defendants-Appellees Ansonia Board of Education, Nicolas Collicelli, Dr. Charles J. Connors, Kenneth Eaton, William Eavens, Del Matricaria, Susan Schumacher, Faith Tingley, and Robert Zuraw.*

James Ferguson, Berlin, Connecticut, *for Defendants-Appellees Ansonia Federation of Teachers, Local 1012, AFL-CIO, Josa Neves, Kathleen Roberts, Mary Ghirardini, Dennis Gleason, Dominick Golia, Maureen Wilkinson, and Georgette Williams.*

MAHONEY, *Circuit Judge*:

Plaintiff-Appellant Ronald Philbrook appeals from findings of fact and conclusions of law[1] of the United States District Court for the District of Connecticut, Thomas F. Murphy, *Judge*. The case involves a claim by plaintiff-appellant Ronald Philbrook of religious discrimination as to conditions of employment, in violation of 42 U.S.C. § 2000e-2(a) and (c) (1988),[2] with respect

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1 Apparently, despite the requirements of Fed. R. Civ. P. 58, no separate judgment was entered following the district court's entry of findings of fact and conclusions of law adverse to Philbrook's claims on July 18, 1989. Philbrook filed a notice of appeal "from the Findings of Fact and Conclusions of Law filed July 18, 1989" on July 21, 1989. We nonetheless conclude that a proper appeal has been taken from a "final decision[ ]" of a district court within the meaning of 28 U.S.C. § 1291 (1988), thus vesting this court with appellate jurisdiction. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) (per curiam); *Fennell v. TLB Kent Co.*, 865 F.2d 498, 499 n.1 (2d Cir. 1989).

2 42 U.S.C. § 2000e-2(a) and (c) (1988) provides:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

• • •

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

to the administration of the leave provisions of collective bargaining agreements between defendants-appellees Ansonia Board of Education (the "Board") and Ansonia Federation of Teachers, Local 1012, AFL-CIO (the "Union"). The initial round of the litigation terminated when the Supreme Court modified our decision to remand to the district court and directed that court to make "findings as to past and existing practice in the administration of the collective-bargaining agreements." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986). On remand, the district court concluded that the administration of the leave provisions of the collective bargaining agreements did not result in a statutory violation.

On appeal, Philbrook contends that the findings of the district court "are inconsistent with the views and instructions of the United States Supreme Court and are, therefore, clearly erroneous." For the reasons that follow, we affirm the decision of the district court.

Background

The background of this litigation is set forth in detail in published opinions of this court and the Supreme Court, *see Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d

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(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

476 (2d Cir. 1985), *aff'd and remanded*, 479 U.S. 60 (1986) ("*Philbrook*"), familiarity with which is assumed. Accordingly, although briefly recounting earlier developments, we focus herein on the facts as they pertain to the issue remaining on appeal.

Ronald Philbrook has taught typing and business at the Ansonia High School since 1962. In February 1968, he was baptized as a member of the Worldwide Church of God. Church teachings require that members refrain from secular employment on certain designated holy days. As a result, Philbrook must miss about six days of work a year.

The school's leave policy allows teachers to take eighteen days of paid "sick leave" a year.[3] This leave may be taken, however, not only for "personal illness and/or illness in the immediate family," but also for the following purposes, subject to the specified limitations as to the number of days allowable therefor:

1. Death in the immediate family.....5 day limit each time
2. Family funeral attendance ....1 day each time
3. Friend funeral attendance ....1 day each time-limit of 2 days per year
4. Immediate family wedding ....1 day each time
5. Immediate family graduation..1 day each time

3 As we stated previously, "[t]he school board's leave policies, as outlined in collective bargaining agreements with the union [(collectively the "Agreement")], have changed over time." *Philbrook*, 757 F.2d at 478. Different versions of the Agreement are described at 757 F.2d 478-79, and the then-current version is set forth at *id.* 479 n.2. Changes for the most part were minor, and are not material to the issue presented on this appeal.

6. Immediate family religious ceremony (Ordination, Vows, Bar Mitzvah, Bas Mitzvah, First Communion, Baptism).....1 day each time

7. Official delegate to national veterans organization.....1 day per year

8. Official delegate (President and/or Business Agent) to national or state teachers organization.....1 day per year-without charge

9. Official delegate (other than President and/or Business Agent)—(limit of 3) to national or state teachers organization .....1 day per year

10. Mandated religious observance .....3 days per year-without charge

    Those holidays which are required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for absence due to religious holidays in excess of three days per year.

11. Necessary personal business.....3 days total per year

    a. Necessary personal business (without approval) .....1 day per year

       Granted at the discretion of the professional staff member with 48 hour notification to the immediate supervisor. Professional staff member will note personal day on the form

provided by Board of Education. In no case shall leave for personal business without approval be used to extend a weekend.

b. Necessary personal business (with approval) ..... 2 days per year

Professional staff member must request the days for personal business on a form provided by the Board of Education forty-eight (48) hours prior to such leave. Reasons for such leave must be stated in sufficiently detailed terms to apprise the Superintendent of the need for such leave, after taking into account the educational needs of the school system.

c. Exceptions regarding the forty-eight (48) hour notice provision, use of prepared forms, and extension of weekends may be made in cases of emergencies.

d. Necessary personal business shall not include (without limitations):

1. Marriage attendance or participation;
2. Day following marriage or wedding trip;
3. Attendance or participation in a sporting or recreational event;
4. Any religious observance;
5. Travel associated with any provision of annual leave;
6. Purposes set forth under annual leave or another leave provision of this contract.

Further, absences resulting from "any judicial proceeding in which the professional staff member is a plaintiff or defendant or is a witness under subpoena" or "due to jury duty" are considered as authorized leave and not charged to annual leave.

This appeal centers upon the categories entitled "mandated religious observance" and "necessary personal business." The key provisions are: (1) the "mandated religious observance" category permits three absences per year "without charge"[4] for "holidays which are required by and obligatory due to written denominational law," but "[n]o annual leave, including accumulated days, shall be used for absence due to religious holidays in excess of three days per year;" and (2) the "necessary personal business" category excludes absences for "[p]urposes set forth under annual leave or another leave provision of this contract," and for "[a]ny religious observance."

The Board refused to allow Philbrook to use his three "necessary personal business" days for paid leave for religious observance beyond the three-day limit. The Board also rejected Philbrook's offer to pay a substitute teacher, rather than being docked the considerably larger amount of a day's pay, for religious observance days in excess of the three allowed. Instead, the Board allowed Philbrook to take additional days, as required, in the form of unpaid leave.

After exhausting all available administrative avenues to contest the Board's decision, Philbrook filed a com-

4 We note that the only other categories of leave that are "without charge" against the eighteen-day annual leave allowance are those for court attendance as a party, witness, or juror, and one day per year as an official delegate (president and/or business agent) to a national or state teachers organization.

plaint in the United States District Court for the District of Connecticut against the Board and the Union which alleged that the foregoing practices and policies (1) "[have] operate[d] to deprive [Philbrook] of equal employment opportunity on account of his religion, in violation of 42 U.S.C. [§] 2000e-2(a) and (c), and defendant Union has failed to assist [Philbrook] fully in gaining relief from these unlawful practices;" and (2) "have operated to deprive [Philbrook] of his right to the free exercise of his religion and have operated as an establishment of religion, in violation of the First and Fourteenth Amendments to the United States Constitution." Philbrook sought both damages and injunctive relief.

In an unpublished opinion, the district court dismissed the complaint, ruling that Philbrook "has not been placed by the School Board or by the Union or any defendant officers thereof, in a position of violating his religion or losing his job."

On appeal, this court reversed, holding that Philbrook had established a prima facie case of religious discrimination. We assumed that the Board's leave policy constituted a reasonable accommodation to Philbrook's religious beliefs, *Philbrook*, 757 F.2d at 484, but ruled that "[w]here the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business." *Id.* The ruling was a gloss on 42 U.S.C. § 2000e(j) (1988), which provides that:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasona-

bly accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Because the district court had not addressed all the issues which we deemed relevant, we remanded the case to the district court for further proceedings. 757 F.2d at 488.

The Supreme Court, however, granted certiorari. The Court addressed only the Title VII claim, observing that although Philbrook's complaint also alleged a violation of his free exercise rights under the first amendment, this court on appeal did not address the issue, and thus the Supreme Court had no occasion to do so. *Philbrook*, 479 U.S. at 65 n.4.

The Court framed the issue before it as "whether the employer's proposed accommodation of [Philbrook's] religious practices comports with the statutory mandate of § [2000e(j)]." *Id.* at 68. The Court rejected our ruling requiring recognition of an employee preference, absent undue hardship, finding "no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accomodation." *Id.* at 68. Rather, the Court held "that an employer has met its obligation under § [2000e(j)] when it demonstrates that it has offered a reasonable accommodation to the employee." *Id.* at 69. Accordingly, the Court concluded that the "remaining issue in the case is whether the school board's leave policy constitutes a reasonable accommodation of Philbrook's religious beliefs." *Id.* at 70.

Addressing this issue, the Court said: "We think that the school board policy in this case, requiring respon-

dent to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement, would generally be a reasonable one." *Id.* at 70. The Court added, however, that "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones," because "[a] provision for paid leave 'that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all.' " *Id.* at 71 (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984)).

The Court concluded:

> Whether the policy here violates this teaching turns on factual inquiry into past and present administration of the personal business leave provisions of the collective-bargaining agreement. The school board contends that the necessary personal business category in the agreement, like other leave provisions, defines a limited purpose leave. Philbrook, on the other hand, asserts that the necessary personal leave category is not so limited, operating as an open-ended leave provision that may be used for a wide range of secular purposes in addition to those specifically provided for in the contract, but not for similar religious purposes. We do not think that the record is sufficiently clear on this point for us to make the necessary factual findings, and we therefore affirm the judgment of the Court of Appeals remanding the case to the District Court. The latter court on remand should make the necessary findings as to past and existing practice in the administration of the collective-bargaining agreements.

Id.

On remand, the district court requested proposed findings of fact and conclusions of law from the parties before holding a hearing. The court then issued a brief memorandum, which stated in pertinent part, "Defendants have submitted on November 9, 1987 . . . proposed findings of fact and conclusions of law to which we have agreed and signed." The court added, however:

> We and plaintiff's counsel remain puzzled . . . by the Supreme Court's direction that we should make the necessary findings as to the "past and existing practices in the administration of the Collective Bargaining Agreement." We surmise that this direction to the existing practice was based on its surmise that the Bargaining Agreement might have been changed since the date of the trial. If so, we should be advised and accordingly will conduct future hearings on that issue if the Agreement has been changed.

On May 4, 1989, the district court conducted an evidentiary hearing concerning the remand issue. Despite the limitation intimated in the foregoing quotation, however, evidence was received regarding the various versions of the Agreement and their administration dating back to 1973. Numerous personal leave request forms submitted by teachers were received in evidence.

Testimony was provided by the current superintendent of schools for the Ansonia public school system, Robert E. Zuraw, a former superintendent, Richard F. Nicolari, and the president of the Ansonia Federation of Teachers, Josa Neves. Zuraw, who approves leave requests, testified that "necessary personal business" leave may

not be taken for reasons specified in the other leave provisions of the Agreement. In addition, he continued, the stated reason "has to be necessary, as far as being important, having some part in the persons [sic] family or personal life." Accordingly, not all requests for "necessary personal business" leave are approved. The "necessary personal business" leave day that is provided "without approval," although "at the professional staff member's discretion" and not requiring a prior specification of its purpose, still cannot be taken for a purpose otherwise specified in the contract. Further, the reason for taking the day is subject to inquiry after the fact to assure compliance with the Agreement. As a general rule, teachers who wish to take a day's leave for a nonqualifying reason may do so, but are not paid.

Nicolari's testimony did not vary in substance from Zuraw's regarding any of the foregoing. Nicolari stated that he would define "necessary personal business" to mean "necessary and essential as opposed to frivolous and recreational." Neves also confirmed Zuraw's testimony concerning the interpretation and administration of the various versions of the Agreement. Neves further testified that paid leave had been denied on the basis of the limitations specified in the Agreement, and that some teachers, aware of those limitations, had at the outset requested unpaid leave for nonconforming leave requests.

After the hearing, the district court issued the further findings of fact and conclusions of law that are the subject of this appeal. They closely parallel, but are not identical to, the findings and conclusions previously submitted by defendants and endorsed by the district court. The key findings of fact are:

10. "Necessary personal business" leave continues to be a limited purpose leave under the provisions of the current bargaining agreement.

* * *

13. The thrust of the restrictions on the use of the three days of "necessary personal business" leave is to disallow the taking of such leave by any teacher for reasons for which leave is provided under other provisions of the Agreement.

14. The leave provisions treat the plaintiff equally with other teachers with respect to the use of "necessary personal business" leave.

The district court's conclusions of law were:

1. In *Ansonia Board of Education et al v. Philbrook*, 479 U.S. 60, 107 S.Ct. 367 (1986), the Supreme Court ruled that providing the plaintiff in this case with unpaid leave for religious observance beyond the amount of paid leave provided for that purpose in the bargaining agreement constitutes a reasonable accommodation to the plaintiff's religious needs unless paid leave is provided for all purposes except religious ones.

2. Under the facts of this case, providing the plaintiff with unpaid leave for religious observance beyond the amount of paid leave allowed for that purpose under the collective bargaining agreement constitutes a reasonable accommodation to the plaintiff's religious beliefs.

This appeal followed.

Discussion

A. *Standard of Review.*

Fed. R. Civ. P. 52(a) provides that "[f]indings of fact . . . shall not be set aside unless clearly erroneous." "[U]nder the clearly erroneous standard, we may only reject findings by the trial court when we are left with the 'definite and firm conviction that a mistake has been committed.' " *Ottaviani v. State Univ.*, 875 F.2d 365, 375 (2d Cir. 1989) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)), *cert. denied*, 110 S.Ct. 721 (1990); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

In this case, the district court on remand initially adopted the findings of fact proposed by the Board. Verbatim adoption of findings prepared by prevailing parties has been criticized by the Supreme Court, *see, e.g., Anderson*, 470 U.S. at 571-72; *United States v. Marine Bancorporation*, 418 U.S. 602, 615 n.13 (1974); *United States v, El Paso Natural Gas Co.*, 376 U.S. 651, 656 & n.4 (1964), and by circuit courts. *See, e.g., Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1407-08 (D.C. Cir.) *on rehearing*, 852 F.2d 619 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 3155 (1989); *see also* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2578, at 704-08 (1971 & Supp. 1990). As we have stated, however, "[t]his method of complying with Fed. R. Civ. P. 52(a) is frowned upon, but is not necessarily fatal." *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 109 n.2 (2d Cir. 1987) (citation omitted).

After the remand hearing, furthermore, the district court issued new findings. Although these were also

taken in large part from those proposed by the Board, modifications were made by the court. The Supreme Court has observed that when a court does not "simply adopt" a party's proposed findings, "the findings issued by the District Court represent the judge's own considered conclusions. There is no reason to subject those findings to a more stringent appellate review than is called for by the applicable rules." *Anderson*, 470 U.S. at 572-73.

B. *The Findings of the District Court.*

Philbrook contends that the district court's findings of fact did not squarely address the issue posed by the Supreme Court's remand, because "the only limitations the district court found on the scope of personal leave were the ones that the Supreme Court had already noted when it requested further findings from the district court: Personal leave is not permitted for uses otherwise specified in the contract." Accordingly, he asks this court to set aside the factual findings of the district court and decide the case in his favor.

We disagree. Far from missing the point of the remand, the district court directed its attention to the precise issue as to which the Supreme Court required further findings. As we view the matter, the Court was concerned whether the Agreement was essentially administered in accordance with its terms, or whether, on the contrary, "necessary personal business" leave "may [in practice] be used for a wide range of secular purposes in addition to those specifically provided for in the contract, but not for similar religious purposes." *Philbrook*, 479 U.S. at 71. Accordingly, a determination that the Agreement is in fact administered according to

its terms addresses and settles the issue posed by the Court's remand.

The remand record not only supported, but compelled, that conclusion. There is *no* evidence in the remand record to support a finding that leave may be taken pursuant to the "necessary personal business" provision of the Agreement for all purposes except religious ones. Rather, such leave may be taken for any reason deemed by the relevant administrator to fall within this general category, with the limitation that such leave may not be taken for those activities otherwise specified in another leave provision, *whether religious in nature or not*, or for "[a]ny religious observance."[5] Thus, Philbrook is limited to three days of paid leave for mandated religious observance, and a colleague who is a delegate to a national veterans organization is limited to one day a year for activity in that capacity. Neither may take any leave for such activity under the "necessary personal business" category, whether or not there is available unused leave in that category. Either may take excess days for these purposes, but without pay. The only difference is that the delegate will be charged against his leave account for the single day that he is allowed to

5 We do not construe the prohibition of "necessary personal business" leave for "[a]ny religious observance" as erecting a general bar against any leave having a religious *purpose*. Nor, obviously, did the Supreme Court so read it, for the Court would hardly have remanded for findings concerning the *administration* of the Agreement if it deemed its very terms to require prohibited religious discrimination. The Agreement specifies, we note, that leave may be taken for "[i]mmediate family religious ceremony (Ordination, Vows, Bar Mitzvah, Bas Mitzvah, First Communion, Baptism)," as well as for family and friend funeral attendance and family weddings, thus making clear that the separately specified categories of "mandated religious observance" and "religious observance" do not exhaustively cover all activities having a religious purpose.

take, should he take it, but Philbrook will not be charged for any of the three days of mandated religious observance that he may take. *See supra* note 4.

The category of "necessary personal business" is, of course, somewhat nebulous, and thus requires judgment calls by the supervisors responsible for administering such leave. No showing was made on remand, however, that in doing so, there is any general animus towards activities that are religious in nature or purpose, or that leave is denied for such activities except as specifically provided by the Agreement. Accordingly, no case is made that religious discrimination violative of 42 U.S.C. § 2000e-2(a) and (c) (1988) has occurred.

Conclusion

The decision of the district court is affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD PHILBROOK, :
Plaintiff,

VS. : CIVIL NO. N-77-489 (TFM)

ANSONIA BOARD OF EDUCATION, ET AL., : NOVEMBER 5, 1987
Defendants.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY THE ANSONIA BOARD OF EDUCATION, NICHOLAS COLLICELLI, DR. CHARLES L. CONNORS, KENNETH EATON, WILLIAM EVANS, DEL MATRICARIA, SUSAN SCHUMACHER, FAITH TINGLEY AND ROBERT ZURAW

The above named Defendants hereby submit proposed findings of fact and conclusions of law upon the remand of the case by the United States Supreme Court.

A. PROPOSED FINDINGS OF FACT

1. Teachers such as the plaintiff who are employed by the defendant school board are provided 18 days of

annual leave for illness and for, among other reasons: death in the immediate family, attendance at the funeral of a friend, attendance at a wedding in the immediate family, attendance at a graduation ceremony, and three days to attend to "necessary personal business." (Pl. Ex. 2-11)

2. Teachers such as the plaintiff are also provided three days of paid leave for religious observance which days are not charged against a teacher's annual accummulation of paid leave. Id.

3. A teacher who chooses to take three days of paid leave for the observance of religious holidays remains entitled to the 18 days paid leave allotted for other reasons. Id

4. The three days allotted for "necessary personal business" may not be used for any of those reasons for

which paid leave is otherwise provided. (pl. Ex. 2-11, Tr. pp. 50-51, 69-70)

5. In order to insure that teachers do not use the three days of "necessary personal business" leave for reasons for which these days may not be used, the school administration monitors the use of such leave by requiring teachers to state the reason for absences in writing. (Tr. p. 49; Deposition of Robert Zuraw pp. 101-106)

6. When a teacher is absent for work, the absence must be approved by the Superintendent's office. Id

7. Since the 1978-79 school year, teachers have been allowed to take one of the three days of "necessary personal business" leave without advance approval from the school administration. (Pl. Ex. 10 & 11)

8. This one day for which advance

approval need not be requested, like other "necessary personal business" leave, cannot be used for any of the reasons for which leave is otherwise provided and teachers are cautioned in this regard. (Pl. Ex. 2-11; Deposition of Zuraw pp. 69-70)

9. A teacher who abuses "necessary personal business" leave, including the one day for which advance approval need not be requested, risks discipline. (Deposition of Zuraw pp. 157, 158)

10. A teacher whose absence is not excused or who is absent for more than the number of days allotted under the leave provisions of the bargaining agreement is docked a day's pay for each such absence. (Pl. Ex. 2-11)

11. The "necessary personal business" leave provisions of the bargaining agreement are not now nor have they been administered in the past

so as to provide paid leave for all purposes except religious ones.

12. That "necessary personal business" leave is a limited purpose leave is evidence by the modest use of such leave. (Pl. Ex. 18)

13. The thrust of the restrictions on the use of the three days of "necessary personal business" leave is to disallow the taking of such leave by any teacher for reasons for which leave is provided under provisions of the Agreement.

14. The leave provisions treat the plaintiff equally with other teachers with respect to the use of "necessary personal business" leave.

15. The personal leave provisions of the bargaining agreement actually favor the plaintiff in the practice of his religion over non-observers because the plaintiff's use of three days paid

leave for religious observance is not charged against his annual accummulation of paid leave. Non-observers do not receive a similar benefit.

CONCLUSIONS OF LAW

1. In Ansonia Board of Education v. Philbrook, _____ U.S. (1986), 107 S. Ct. 367 (1986), the Supreme Court ruled that requiring the plaintiff in this case to take unpaid leave for religious observance beyond the amount of paid leave provided for that purpose in the bargaining agreement constitutes a reasonable accommodation to the plaintiff's religious needs unless paid leave is provided for all purposes except religious ones. Id. at 373.

2. Under the facts of this case, providing the plaintiff with unpaid leave for religious observance beyond

the amount of paid leave allowed for that purpose under the collective bargaining agreement constitutes a reasonable accommodation to the plaintiff's religious beliefs.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD PHILBROOK, :
Plaintiff,

VS. : CIVIL NO. N-77-489 (TFM)

ANSONIA BOARD OF EDUCATION, ET AL., : MEMORANDUM
Defendants.

MURPHY, D.J.

Pursuant to the direction of the Supreme Court in its opinion dated November 17, 1986, _____ U.S. ____, 107 S.Ct. 367 (1986) we were directed to make necessary findings "as to past and existing practices in the administration of Collective Bargaining Agreement." Defendants have submitted on November 19, 1987 such proposed findings of fact and conclusions of law to which we have agreed and signed.

We and plaintiff's counsel remain puzzled however, by the Supreme Court's direction that we should make the

necessary findings as to the "past and existing practices in the administration of the Collective Bargaining Agreement." We surmise that this direction to the existing practice was based on its surmise that the Bargaining Agreement might have been changed since the date of the trial. If so, we should be advised that accordingly will conduct future hearings on that issue if the Agreement has been changed.

Thomas F. Murphy
United States
District Judge

November 28, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD PHILBROOK, :
Plaintiff,

VS. : CIVIL NO. N-77-489 (TFM)

ANSONIA BOARD OF EDUCATION, ET AL., :
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The current collective bargaining agreement contains personal leave provisions which are substantially the same as those in prior agreements.

2. The only change of significance from prior bargaining agreements is that the one day of necessary personal business leave which may be used without prior approval may not be used to extend a weekend.

3. Teachers such as the plaintiff who are employed by the defendant

school board continue to be provided 18 days of annual leave for illness and, among other reasons: death in the immediate family, attendance at the funeral of a friend, attendance at a wedding in the immediate family, attendance at a graduation ceremony, and three days to attend to "necessary personal business."

4. A teacher who chooses to take three days of paid leave for the observance of religious holidays remains entitled to the 18 days paid leave allotted for other reasons.

5. The bargaining agreement continues to provide that the three days allotted for "necessary personal business" may not be used for any of those reasons for which paid leave is otherwise provided and may be used only for reasons which require absence from work.

6. In order to ensure that teachers do not use the three days of "necessary personal business" leave for reasons for which these days may not be used, the school administration monitors the use of such leave.

7. The collective bargaining agreement continues to allow teachers to take one of the three days of "necessary personal business" leave without advance approval from the school administration.

8. This one day for which advance approval need not be requested, like other "necessary personal business" leave, cannot be used for any of the reasons for which leave is otherwise provided.

9. The number of personal leave days used by teachers annually is approximately the same as the number of such days used by teachers in 1983.

10. "Necessary personal business" leave continues to be a limited purpose leave under the provisions of the current bargaining agreement.

11. A teacher who abuses "necessary personal business" leave, including the one day for which advance approval need not be requested, continues to risk discipline.

12. The "necessary personal business" leave provisions of the bargaining agreement are not now nor have they been administered in the past so as to provide paid leave for all purposes except religious ones.

13. The thrust of the restrictions on the use of three days of "necessary personal business" leave is to disallow the taking of such leave by any teacher for reasons for which leave is provided under other provisions of the Agreement.

14. The leave provisions treat the

plaintiff equally with other teachers with respect to the use of "necessary personal business" leave.

15. The personal leave provisions of the bargaining agreement actually favor the plaintiff in the practice of his religion over non-observers because the plaintiff's use of three days paid leave for religious observance is not charged against his annual accumulation of paid leave. Non-observers do not receive a similar benefit.

CONCLUSIONS OF LAW

1. In Ansonia Board of Education, et al. v. Philbrook, 479 U.S. 60, 107 S.Ct. 367 (1986), the Supreme Court ruled that providing the plaintiff in this case with unpaid leave for religious observance beyond the amount of paid leave provided for that purpose in the bargaining agreement constitutes a reasonable accommodation to the

plaintiff's religious needs unless paid leave is provided for all purposes except religious ones.

2. Under the facts of this case, providing the plaintiff with unpaid leave for religious observance beyond the amount of paid leave allowed for that purpose under the collective bargaining agreement constitutes a reasonable accommodation to the plaintiff's religious beliefs.

_____

Thomas F. Murphy, USDJ

Dated: July 17, 1989

ANSONIA BOARD OF EDUCATION ET AL. *v.* PHILBROOK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 85-495. Argued October 14, 1986—Decided November 17, 1986

Respondent Philbrook (hereafter respondent), a teacher employed by petitioner school board (Board), is a member of a church whose tenets require members to refrain from secular employment during designated holy days, a practice that has caused respondent to miss approximately six schooldays each year. Under pertinent collective-bargaining agreements between the Board and the teachers' union, teachers were granted three days' annual leave for observance of religious holidays, but could not use for religious observance any accumulated sick leave, three days of which were otherwise available for "necessary personal business." Pursuant to the collective-bargaining agreements, respondent used the three days granted for religious holidays each year, and then either took unauthorized unpaid leave, scheduled required hospital visits on church holy days, or worked on those days. Respondent repeatedly asked the Board either to adopt the policy of allowing use of the three days of personal business leave for religious observance or, in the alternative, to allow him to pay the cost of a substitute and receive full pay for additional days off for religious observances. The Board consistently rejected both proposals, and respondent ultimately filed suit in Federal District Court, alleging that the Board had violated the prohibition against religious discrimination under Title VII of the Civil Rights Act of 1964, particularly the Board's obligation under § 701(j) of the Act to "reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." After trial, the District Court concluded that respondent had failed to prove a case of religious discrimination because he had not been placed by the Board in a position of violating his religion or losing his job. The Court of Appeals reversed and remanded, holding that respondent had established a prima facie case of discrimination. The court then assumed that the Board's leave policy constituted a reasonable accommodation to respondent's belief, but held that where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the employee's proposal unless that accommodation causes undue hardship on the conduct of the employer's business.

The case was remanded for consideration of the hardship that would result from respondent's suggestions.

Held:

1. This case presents no issue that requires, for purposes of Title VII religious accommodation claims, the establishing of a proof scheme delineating a plaintiff's prima facie case and the shifting production burdens. The ultimate Title VII question of discrimination *vel non* was directly before the District Court because the Board failed to persuade the court to dismiss the action for want of a prima facie case, and the case was fully tried on the merits. Thus, the issue whether respondent made out a prima facie case was no longer relevant. Cf. *United States Postal Service Board of Governors* v. *Aikens*, 460 U. S. 711. Pp. 67–68.

2. Neither the terms nor the legislative history of § 701(j) supports the Court of Appeals' conclusion that an employer's accommodation obligation includes a duty to accept the employee's proposal unless that accommodation causes undue hardship on the conduct of the employer's business. An employer has met its obligation under § 701(j) when it demonstrates that it has offered a reasonable accommodation to the employee. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship. The extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship. Pp. 68–69.

3. Because both of the courts below applied an erroneous view of the law, neither explicitly considered the question whether the Board's leave policy constituted a reasonable accommodation of respondent's religious beliefs. There are insufficient factual findings as to the manner in which the collective-bargaining agreements have been interpreted in order for this Court to make that judgment initially. On remand the District Court should make the necessary findings as to past and existing practice in the administration of the collective-bargaining agreements. Pp. 70–71.

757 F. 2d 476, affirmed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, O'CONNOR, and SCALIA, JJ., joined. MARSHALL, J., *post*, p. 71, and STEVENS, J., *post*, p. 75, filed opinions concurring in part and dissenting in part.

Thomas N. Sullivan argued the cause for petitioners. With him on the briefs was *Robert J. Murphy*. *Robert F. McWeeny* argued the cause and filed a brief for Ansonia Fed-

eration of Teachers, respondent under this Court's Rule 19.6, in support of petitioners.

David N. Rosen argued the cause for respondent Philbrook. With him on the brief was *Paul Gewirtz.*

Solicitor General Fried argued the cause for the United States et al. as *amici curiae* urging affirmance. With him on the brief were *Assistant Attorneys General Reynolds* and *Willard, Deputy Solicitor General Carolyn B. Kuhl, Deputy Assistant Attorney General Carvin, Richard J. Lazarus, Brian K. Landsberg, Louise A. Lerner,* and *Johnny J. Butler.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Ansonia Board of Education has employed respondent Ronald Philbrook since 1962 to teach high school business and typing classes in Ansonia, Connecticut. In 1968, Philbrook was baptized into the Worldwide Church of God. The tenets of the church require members to refrain from secular employment during designated holy days, a

*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *Michael H. Gottesman, David M. Silberman,* and *Laurence Gold;* and for the Equal Employment Advisory Council et al. by *Robert E. Williams, Douglas S. McDowell, William S. Franklin, August W. Steinhilber, Gwendolyn H. Gregory,* and *Thomas A. Shannon.*

Briefs of *amici curiae* urging affirmance were filed for the State of Connecticut by *Joseph I. Lieberman,* Attorney General, *Clarine Nardi Riddle,* Deputy Attorney General, *Henry S. Cohn* and *Robert B. Teitelman,* Assistant Attorneys General, and *Philip A. Murphy, Jr.;* for the American Jewish Congress et al. by *Marc D. Stern* and *Ronald A. Krauss;* for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* for the Council on Religious Freedom by *Lee Boothby, James M. Parker,* and *Robert W. Nixon;* for the General Conference of Seventh-day Adventists by *Walter E. Carson;* for the Presbyterian Church (USA) et al. by *Douglas Laycock, Samuel E. Ericsson, Michael J. Woodruff,* and *Kimberlee Wood Colby;* and for the Rutherford Institute et al. by *W. Charles Bundren, Guy O. Farley, Jr., Larry L. Crain, Thomas O. Kotouc, Alfred Lindh, William B. Hollberg,* and *Wendell R. Bird.*

practice that has caused respondent to miss approximately six schooldays each year. We are asked to determine whether the employer's efforts to adjust respondent's work schedule in light of his belief fulfill its obligation under § 701 (j) of the Civil Rights Act of 1964, 86 Stat. 103, 42 U. S. C. § 2000e(j), to "reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."[1]

Since the 1967–1968 school year, the school board's collective-bargaining agreements with the Ansonia Federation of Teachers have granted to each teacher 18 days of leave per year for illness, cumulative to 150 and later to 180 days. Accumulated leave may be used for purposes other than illness as specified in the agreement. A teacher may accordingly use five days' leave for a death in the immediate family, one day for attendance at a wedding, three days per year for attendance as an official delegate to a national veterans organization, and the like. See, *e. g.*, App. 98–99. With the exception of the agreement covering the 1967–1968 school year, each contract has specifically provided three

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[1] The reasonable accommodation duty was incorporated into the statute, somewhat awkwardly, in the definition of religion. Title VII's central provisions make it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ," § 703(a)(1), 42 U. S. C. § 2000e–2(a)(1), or "to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion . . . ." § 703(a)(2), 42 U. S. C. § 2000e–2(a)(2). Section 701(j), 42 U. S. C. § 2000e(j), was added in 1972 to illuminate the meaning of religious discrimination under the statute. It provides that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

days' annual leave for observance of mandatory religious holidays, as defined in the contract. Unlike other categories for which leave is permitted, absences for religious holidays are not charged against the teacher's annual or accumulated leave.

The School Board has also agreed that teachers may use up to three days of accumulated leave each school year for "necessary personal business." Recent contracts limited permissible personal leave to those uses not otherwise specified in the contract. This limitation dictated, for example, that an employee who wanted more than three leave days to attend the convention of a national veterans organization could not use personal leave to gain extra days for that purpose. Likewise, an employee already absent three days for mandatory religious observances could not later use personal leave for "[a]ny religious activity," *id.*, at 80, 83, 86, 89, 92, or "[a]ny religious observance." *Id.*, at 96, 100. Since the 1978–1979 school year, teachers have been allowed to take one of the three personal days without prior approval; use of the remaining two days requires advance approval by the school principal.

The limitations on the use of personal business leave spawned this litigation. Until the 1976–1977 year, Philbrook observed mandatory holy days by using the three days granted in the contract and then taking unauthorized leave. His pay was reduced accordingly.[2] In 1976, however, respondent stopped taking unauthorized leave for religious reasons, and began scheduling required hospital visits on church holy days. He also worked on several holy days. Dissatisfied with this arrangement, Philbrook repeatedly asked the School Board to adopt one of two alternatives. His preferred alternative would allow use of personal business leave for religious observance, effectively giving him three addi-

[2] Absence for reasons not contemplated by the contract resulted in a proportionate deduction from pay: since 1971, 1/180 of annual salary had been deducted for each day of unexcused absence. App. 84, 90, 93, 97, 101.

tional days of paid leave for that purpose. Short of this arrangement, respondent suggested that he pay the cost of a substitute and receive full pay for additional days off for religious observances.[1] Petitioner has consistently rejected both proposals.

In 1973 Philbrook filed a complaint with the Connecticut Commission on Human Rights and Opportunities and the Equal Employment Opportunity Commission against the school board and the Ansonia Federation of Teachers. After exhausting the available administrative avenues, he filed a complaint in the United States District Court for the District of Connecticut, alleging that the prohibition on the use of "necessary personal business" leave for religious observance violated §§ 703(a)(1), (2) of Title VII, 42 U. S. C. §§ 2000e–2(a)(1), (2), and seeking both damages and injunctive relief.[2]

After a 2-day trial, the District Court concluded that Philbrook had failed to prove a case of religious discrimination because he had not been placed by the school board in a position of violating his religion or losing his job.

The Court of Appeals for the Second Circuit reversed and remanded for further proceedings. It held that a prima facie case of discrimination is established when an employee shows that

> "'(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting em-

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[1] The suggested accommodation would reduce the financial costs to Philbrook of unauthorized absences. In 1984, for example, a substitute cost $30 per day, and respondent's loss in pay from an unauthorized absence was over $130.

[2] Philbrook's complaint also alleged that petitioner Board's policies and practices violated his free exercise rights under the First Amendment. Because the Court of Appeals remanded the Title VII claim for further proceedings, it did not address Philbrook's First Amendment claims, and we have no occasion to consider them here.

ployment requirement.' " 757 F. 2d 476, 481 (1985), quoting *Turpen* v. *Missouri-Kansas-Texas R. Co.*, 736 F. 2d 1022, 1026 (CA5 1984).

Philbrook established his case, the court held, by showing that he had a sincere religious belief that conflicted with the employer's attendance requirements, that the employer was aware of the belief, and that he suffered a detriment—namely, a loss of pay—from the conflict.[5] The court then assumed that the employer's leave policy constituted a reasonable accommodation to Philbrook's belief. It held, however, that "[w]here the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business." 757 F. 2d, at 484. The Court of Appeals remanded for consideration of the hardship that would result from Philbrook's suggestions.

We granted certiorari to consider the important questions of federal law presented by the decision of the Court of Appeals. 474 U. S. 1080 (1986). Specifically, we are asked to address whether the Court of Appeals erred in finding that Philbrook established a prima facie case of religious discrimination and in opining that an employer must accept the employee's preferred accommodation absent proof of undue hardship. We find little support in the statute for the approach adopted by the Court of Appeals, but we agree that the ultimate issue of reasonable accommodation cannot be resolved without further factual inquiry. We accordingly affirm the judgment of the Court of Appeals remanding the case to the District Court for additional findings.

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[5] Judge Pollack, Senior District Judge of the Southern District of New York sitting by designation, dissented. He agreed with the District Court that "[t]he School Board's policy neither deprives the plaintiff of employment opportunities nor adversely affects his employment status." 757 F. 2d, at 489. Accordingly, he found that the policy did not "'discriminate' within Title VII's use and meaning of that term . . . ." *Ibid.*

As we noted in our only previous consideration of § 701(j), its language was added to the 1972 amendments on the floor of the Senate with little discussion. *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 74, n. 9 (1977). See 118 Cong. Rec. 705–706 (1972). In *Hardison*, *supra*, at 84, we determined that an accommodation causes "undue hardship" whenever that accommodation results in "more than a *de minimis* cost" to the employer. Hardison had been discharged because his religious beliefs would not allow him to work on Saturdays and claimed that this action violated the employer's duty to effect a reasonable accommodation of his beliefs. Because we concluded that each of the suggested accommodations would impose on the employer an undue hardship, we had no occasion to consider the bounds of a prima facie case in the religious accommodation context or whether an employer is required to choose from available accommodations the alternative preferred by the employee. The employer in *Hardison* simply argued that all conceivable accommodations would result in undue hardship, and we agreed.

Petitioner asks us to establish for religious accommodation claims a proof scheme analogous to that developed in other Title VII contexts, delineating the plaintiff's prima facie case and shifting production burdens. See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973). But the present case raises no such issue. As in *United States Postal Service Board of Governors* v. *Aikens*, 460 U. S. 711 (1983), the defendant here failed to persuade the District Court to dismiss the action for want of a prima facie case, and the case was fully tried on the merits. We held in *Aikens* that these circumstances place the ultimate Title VII question of discrimination *vel non* directly before the court. "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer rele-

vant." *Id.*, at 715. We may therefore proceed to the question whether the employer's proposed accommodation of respondent's religious practices comports with the statutory mandate of § 701(j).

In addressing this question, the Court of Appeals assumed that the employer had offered a reasonable accommodation of Philbrook's religious beliefs. This alone, however, was insufficient in that court's view to allow resolution of the dispute. The court observed that the duty to accommodate "cannot be defined without reference to undue hardship." 757 F. 2d, at 484. It accordingly determined that the accommodation obligation includes a duty to accept "the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business." *Ibid.* Cf. *American Postal Workers Union* v. *Postmaster General*, 781 F. 2d 772, 776 (CA9 1986) (Title VII does not dictate that "an employer must accept any accommodation, short of 'undue hardship,' proposed by an employee . . ."). Because the District Court had not considered whether Philbrook's proposals would impose undue hardship, the Court of Appeals remanded for further consideration of those proposals.

We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation. By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation. The employer violates the statute unless it "demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U. S. C. § 2000e(j). Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship. As *Hardison* illustrates, the extent of

undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship. Once the Court of Appeals assumed that the school board had offered to Philbrook a reasonable alternative, it erred by requiring the Board to nonetheless demonstrate the hardship of Philbrook's alternatives.

The legislative history of § 701(j), as we noted in *Hardison*, *supra*, at 74–75, and n. 9, is of little help in defining the employer's accommodation obligation. To the extent it provides any indication of congressional intent, however, we think that the history supports our conclusion. Senator Randolph, the sponsor of the amendment that became § 701(j), expressed his hope that accommodation would be made with "flexibility" and "a desire to achieve an adjustment." 118 Cong. Rec. 706 (1972). Consistent with these goals, courts have noted that "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Brener* v. *Diagnostic Center Hospital*, 671 F. 2d 141, 145–146 (CA5 1982). See also *American Postal Workers*, *supra*, at 777. Under the approach articulated by the Court of Appeals, however, the employee is given every incentive to hold out for the most beneficial accommodation, despite the fact that an employer offers a reasonable resolution of the conflict. This approach, we think, conflicts with both the language of the statute and the views that led to its enactment. We accordingly hold that an employer has met its obligation under § 701(j) when it demonstrates that it has offered a reasonable accommodation to the employee.[6]

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[6] The Court of Appeals found support for its decision in the EEOC's guidelines on religious discrimination. 757 F. 2d, at 485, and n. 7. Specifically, the guidelines provide that "when there is more than one means of accommodation which would not cause undue hardship, the employer . . . must offer the alternative which least disadvantages the individual with re-

The remaining issue in the case is whether the school board's leave policy constitutes a reasonable accommodation of Philbrook's religious beliefs. Because both the District Court and the Court of Appeals applied what we hold to be an erroneous view of the law, neither explicitly considered this question. We think that there are insufficient factual findings as to the manner in which the collective-bargaining agreements have been interpreted in order for us to make that judgment initially. We think that the school board policy in this case, requiring respondent to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement, would generally be a reasonable one. In enacting § 701(j), Congress was understandably motivated by a desire to assure the individual additional opportunity to observe religious practices, but it did not impose a duty on the employer to accommodate at all costs. *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63 (1977). The provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work. Generally speaking; "[t]he direct effect of [unpaid leave] is merely a loss of income for the period

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spect to his or her employment opportunities." 29 CFR § 1605.2(c)(2)(ii) (1986). Though superficially consistent with the burden imposed by the Court of Appeals, this guideline, by requiring the employer to choose the option that least disadvantages an individual's *employment opportunities*, contains a significant limitation not found in the court's standard. To the extent that the guideline, like the approach of the Court of Appeals, requires the employer to accept any alternative favored by the employee short of undue hardship, we find the guideline simply inconsistent with the plain meaning of the statute. We have, of course, noted that EEOC guidelines are properly accorded less weight than administrative regulations declared by Congress to have the force of law. *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 141 (1976); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140 (1944). See also *Trans World Airlines, Inc.* v. *Hardison* 432 U. S. 63, 76, n. 11. (1977).

the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status." *Nashville Gas Co.* v. *Satty*, 434 U. S. 136, 145 (1977).

But unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones. A provision for paid leave "that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all." *Hishon* v. *King & Spalding*, 467 U. S. 69, 75 (1984). Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness. Whether the policy here violates this teaching turns on factual inquiry into past and present administration of the personal business leave provisions of the collective-bargaining agreement. The school board contends that the necessary personal business category in the agreement, like other leave provisions, defines a limited purpose leave. Philbrook, on the other hand, asserts that the necessary personal leave category is not so limited, operating as an open-ended leave provision that may be used for a wide range of secular purposes in addition to those specifically provided for in the contract, but not for similar religious purposes. We do not think that the record is sufficiently clear on this point for us to make the necessary factual findings, and we therefore affirm the judgment of the Court of Appeals remanding the case to the District Court. The latter court on remand should make the necessary findings as to past and existing practice in the administration of the collective-bargaining agreements.

It is so ordered.

JUSTICE MARSHALL, concurring in part and dissenting in part.

I agree with the Court's conclusion that, if the school board provides paid leave "for all purposes *except* religious ones," *ante* this page, its accommodation of Philbrook's religious needs would be unreasonable and thus violate Title VII.

But I do not find the specificity of the personal business leave, or the possibility that it may be used for activities similar to the religious activities Philbrook seeks leave to pursue, necessarily dispositive of whether the Board has satisfied its affirmative duty under § 701(j), 42 U. S. C. § 2000e(j), to reasonably accommodate Philbrook's religious needs. Even if the District Court should find that the personal leave is restricted to specific secular uses having no similarity with Philbrook's religious activities, Philbrook would still encounter a conflict between his religious needs and work requirements. In my view, the question would remain whether, without imposing an undue hardship on the conduct of its educational program, the school board could further reasonably accommodate Philbrook's need for additional religious leave.

If, for example, the personal business leave were so limited that it allowed teachers paid leave for the sole purpose of meeting with their accountants to prepare their income tax returns (a purely secular activity), a proposal from Philbrook that he be allowed to prepare his tax return on his own time and use this paid leave for religious observance might be found imminently reasonable and lacking in undue hardship. The Board's prior determination that the conduct of its educational program can withstand the paid absence of its teachers for up to six days each year for religious and personal reasons tends to indicate that granting Philbrook's similar request in this case for a total of six days paid religious leave and no personal leave is reasonable, would cause the Board no undue hardship, and hence falls within the scope of the Board's affirmative obligation under Title VII.

The Court suggests that requiring an employer to consider an employee's proposals would enable the employee to hold his employer hostage in exchange for a particular accommodation. *Ante*, at 69. If the employer has offered a reasonable accommodation that *fully* resolves the conflict between the employee's work and religious requirements, I agree that

no further consideration of the employee's proposals would normally be warranted. But if the accommodation offered by the employer does not completely resolve the employee's conflict, I would hold that the employer remains under an obligation to consider whatever *reasonable* proposals the employee may submit.

I do not accept the Court's conclusion that the statute, "[b]y its very terms," relieves the Board from this continuing duty to accommodate the special religious practices of its employees where doing so is reasonable and causes no undue hardship. *Ante*, at 68. The statute simply creates an affirmative duty to accommodate; it does not specify who must respond to whom. Nor am I persuaded that the legislative history cited by the Court disposes of this issue. The statement of Senator Randolph, who sponsored the amendment, that he hoped the "accommodation would be made with 'flexibility' and 'a desire to achieve an adjustment,'" lends at least as much support to the concept of the employer's continuing duty as it does to the Court's reading of the statute. *Ante*, at 69 (quoting 118 Cong. Rec. 706 (1972)).

The EEOC's guidelines on religious discrimination support an interpretation of the statute placing this continuing duty to accommodate on the employer.* Just last Term, in

*EEOC Guideline § 1605.2(c) states:

"(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

"(i) The alternatives for accommodation considered by the employer or labor organization; and

"(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities." 29 CFR § 1605.2(c) (1986).

Meritor Savings Bank v. *Vinson*, 477 U. S. 57, 65 (1986), we expressly relied on an EEOC guideline in holding that sexual harassment charges could provide the basis for a Title VII claim. The Court's reluctance to accord similar weight to the EEOC's interpretation here rests on nothing more than a selective reading of the express provisions of Title VII and the guidelines. *Ante*, at 69–70, n. 6. Title VII prohibits discrimination not only with respect to *employment opportunities*, § 703(a)(2), 42 U. S. C. § 2000e–2(a)(2), but also with respect to "*compensation*, terms, conditions, or privileges of employment." § 703(a)(1), 42 U. S. C. § 2000e–2(a)(1) (emphasis added). The EEOC guidelines consider compensation encompassed within the concept of "employment opportunities." 29 CFR § 1605.2(c) (1986). A forced reduction in compensation based on an employee's religious beliefs can be as much a violation of Title VII as a refusal to hire or grant a promotion.

In this case, contrary to the Court's conclusion, *ante*, at 70–71, the school board's accommodation of Philbrook's religious needs by merely allowing unpaid leave does not eliminate the conflict. Rather, the offer forces Philbrook to choose between following his religious precepts with a partial forfeiture of salary and violating these precepts for work with full pay. It is precisely this loss of compensation that entitles Philbrook to further accommodation, if reasonably possible without undue hardship to the school board's educational program. It may be that unpaid leave will generally amount to *a* reasonable accommodation, but this does not mean that unpaid leave will always be *the* reasonable accommodation which *best* resolves the conflict between the needs of the employer and employee. In my view, then, an offer of unpaid leave does not end the inquiry: If an employee, in turn, offers another reasonable proposal that results in a more effective resolution without causing undue hardship, the employer should be required to implement it.

The Court's analysis in *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63 (1977), is difficult to reconcile with its holding today. In *Hardison*, the Court held that the employer's chosen work schedule was a reasonable accommodation but nonetheless went on to consider and reject each of the alternative suggested accommodations. The course followed in *Hardison* should have been adopted here as well. "Once it is determined that the duty to accommodate sometimes requires that an employee be exempted from an otherwise valid work requirement, the only remaining question is . . . : Did [the employer] prove that *it exhausted all reasonable accommodations*, and that the *only remaining alternatives would have caused undue hardship* on [the employer's] business?" *Id.*, at 91 (MARSHALL, J., dissenting) (emphasis added).

Accordingly, I would remand this case for factual findings on both the intended scope of the school board's leave provision *and* the reasonableness and expected hardship of Philbrook's proposals.

JUSTICE STEVENS, concurring in part and dissenting in part.

While I agree with the Court's rejection of the rationale of the Court of Appeals' opinion, I would simply reverse its judgment. Remanding for further proceedings in the District Court is both unnecessary and confusing. Whether respondent Philbrook's complaint is analyzed as an outright claim that he is entitled to six paid days of leave for religious observance or as an argument that petitioner's employment policies, while facially neutral, fail to accommodate his religious beliefs, the record before us plainly discloses that he cannot prevail.

I

The school board has a clear duty not to discriminate against Philbrook because of his religious faith. Section 703(a) of the Civil Rights Act of 1964 flatly prohibits an em-

ployer from discriminating against any individual by basing employment and workplace decisions on the employee's or prospective employee's religion. This stricture against disparate treatment based on religion is simultaneously extended and qualified by § 701, which defines religion for purposes of the Act. Congress defines religion to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." § 701(j). The statute therefore imposes a duty on the employer to make reasonable accommodations, short of undue hardship, for the religious practices of his employees. *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 74 (1977). The effect of § 703(a) is to impose a special duty upon the employer when—and only when—a conflict arises between an individual's religious observance or practice and the employer's policy.

The statute does not allow a plaintiff raising a claim under § 701(j) to charge immediately onto the field of undue hardship. Folded within § 701(j) are certain preliminary inquiries. First, the court must ask whether the employee's job obligations are in conflict with his religious obligations. "The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee." *Hardison, supra*, at 87 (MARSHALL, J., dissenting). Absent a conflict, it makes no sense to speak of a duty to accommodate; there is no competing claim on the employee for which the employer must make adjustments. If the duty does arise, the statute requires the employer to resolve the conflict if it can do so without undue hardship. As the Court correctly holds, the employer has no statutory duty to resolve the conflict in the way the employee requests as long as the solution that is adopted is reasonable. I find it equally clear that the em-

ployer has no statutory duty to do anything more than strictly necessary to resolve the conflict.

Because the existence and scope of the duty to accommodate depend solely on the nature of the conflict between the terms of the job and the requirements of the religion, it is essential to identify the alleged conflict as precisely as possible. In this case Philbrook's faith prevents him from working on certain schooldays. The school board does not require him to work on any of those days; on three of those days each year it pays him even though he does not work, and on the other days it declines to pay him for the time that he spends discharging his religious obligations. The existence of a conflict is thus not immediately apparent.

Philbrook argues, however, that the contractual arrangement occasions two conflicts between his religious requirements and his employer's job requirements. First, he argues that the employer's practice of excluding religious observance as a permissible use of the three days of paid annual leave for "necessary personal business" is directly in conflict with his religious practice, because he needs to take those days as days of religious obligation. Second, during his unpaid absence from work on days of religious obligation, he is unable to do work and must later—or earlier—perform this work without separate compensation. In essence, he argues that the employer's practice of requiring him to complete this work, which is an integral part of his job duties as a salaried employee, conflicts with his religious obligation to be absent on the days when he would otherwise have performed this work and been paid for it. An examination of these claims discloses that neither has merit.

II

Philbrook has contended that the school board has discriminated on the basis of religion in the allocation of its paid annual leave, or more specifically, in the limitation it has placed on the use of three days of paid annual leave for neces-

sary personal business. Properly viewed, the conflict Philbrook alleges is one which is not cognizable under § 703 and therefore entitles him to no relief. He points to the conflict, by no means specific to the practice of religion, between the Board's leave policy and the needs of an employee who wishes to use the three days of necessary personal business leave for any purpose not allowed by the contract. The Board allows all of its teachers three days of paid annual leave for "necessary personal business" but prohibits them from using any of those days for "[a]ny religious activity." On its face, this prohibition might appear to discriminate against employees who need to take a day off to attend church in favor of those who need a day off for secular reasons. The argument fails, however, because it does not fully describe either the scope of the separate provision for paid leave for religious purposes or the restricted scope of the provision for leave for necessary personal business.

The collective-bargaining agreement between the school board and the teachers' union contains generous provisions for paid leave for various specific purposes. After stating that 18 days of annual leave shall be granted "for personal illness and/or illness in the immediate family," the contract specifies 11 additional categories of personal leave, including 5 days for a death in the immediate family, 1 day each for attendance at funerals, weddings, graduations, and immediate family religious services, and 3 days each for "[m]andated religious observances" and "[n]ecessary personal business." The teacher is not required to identify the specific character of his personal business, but the contract limits the teacher's discretion by stating:

> "Necessary personal business shall not include (without limitations):
>
> "1. Marriage attendance or participation;
>
> "2. Day following marriage or wedding trip;
>
> "3. Attendance or participation in a sporting or recreational event;

"4. Any religious observance;
"5. Travel associated with any provision of annual leave;
"6. Purposes set forth under annual leave or another leave provision of this contract." App. 100.

Philbrook does not contend that the leave policy is discriminatory because he is eligible for, or has actually received, fewer days of paid leave than members of other religious faiths or than teachers who have no religious obligations on schooldays. The basis of his principal discrimination argument is that the total of six days for mandated religious observances and necessary personal business is not adequate to enable him to take care of "the personal business that is most important and pressing to him: religious activity and observance,"[1] whereas this combination of six days of paid leave is adequate for some teachers who have different religious and ethical commitments. Quite clearly, however, this argument rests on the premise that Philbrook's special, that is, religious, needs entitle him to extraordinary treatment. His "discrimination" argument states a grievance against equal treatment rather than a claim that he has been the recipient of unequal treatment.[2]

[1] "On the other hand, after Philbrook uses up his three days for religious leave, Ansonia's personal leave policy does not allow him to use the remaining three days of personal leave for the personal business that is most important and pressing to him: religious activity and observance. Unlike the Jewish teacher, Philbrook is a member of a faith that requires more than three days away from work for religious observance. *His* important and necessary personal business, involving fulfilling his need to gain understanding of the world around him, to serve the highest interests of his community, and to provide guidance and stability for his family, are all served by performing his religious obligation and attending his church. Solely because these needs are fulfilled for him through religious observance rather than secular activity, he is prohibited from using his personal leave to meet them." Brief for Respondent Philbrook 16.

[2] Denying the use of personal business days for religious purposes is no more discriminatory against religion than if the personal business leave category were entirely absent from the contract. Neither a decision to refuse personal business leave days altogether nor a decision to provide

This point comes into sharp focus when the contractual prohibition against using the three days of personal leave for "any religious observance" is seen for what it is, merely a part of the broader prohibition against using personal business leave for any of the purposes specifically authorized in the contract. The existing leave policy denies paid days to any teacher who proposes to take more paid days of personal business leave per year to fulfill his or her commitments than the contract allows. Philbrook's wish to use his secular leave for religious purposes is thwarted by the same policy that denies an avid official delegate to a national veterans' organization use of secular leave days for that activity in excess of the days specifically allotted for it under the contract. In fact, since three days are expressly authorized for mandated religious observances—events that recur each year—whereas most other categories of paid leave cover relatively infrequent contingencies such as a death in the family or attendance at a family wedding, it is highly probable that the leave policy as a whole tends to favor, rather than to disfavor, persons who must observe religious days during the school year. For example, an atheist who attends a wedding, a funeral, and a graduation on schooldays receives a total of three days of paid personal leave, but a religious person who attends the same three events on paid days also receives pay for three religious days.

III

Philbrook's second claim is that the board has a duty of reasonable accommodation "to mitigate the burden of the Board's requirement that [he] work without pay in connection with his absence for religious observance." Brief for

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these days for specific purposes not otherwise provided for in the contract represents a discrimination against religion.

Respondent Philbrook 24.[3] This claim founders because it discloses no conflict between Philbrook's religion and his employment. If he had been disciplined, or discharged, for taking too many days off for religious services, the result would be different, but the only inconvenience to which he is subjected is the necessity of doing work on paid days that he was unable to do during his days of religious observance. This inconvenience arises not because of any discrimination against religion, but because the employee's missed day of work is unpaid. Every employee who takes a day off from work for an unauthorized purpose suffers the same inconvenience as Philbrook; each loses a day of pay and must make up the work associated with that day. The obligation to perform the work carries over, not because the employee has exercised his religion in the one case or satisfied a secular business need in another, but for the generic and shared reason that the employee was not paid for a day on which he was hired to do work. Since no statutory conflict between Philbrook's religion and his work duties occurred, the duty to accommodate his religious practices never arose.

IV

The present state of the record enables me to conclude that Philbrook states no claim of religious discrimination under § 703(a). In remanding the case, the Court apparently overlooks the plain fact that its rejection of the Court of Appeals' view of the duty of reasonable accommodation eliminates the necessity for further factual findings. Under the Court of

[3] As he explains:

"His job has at least three parts: For every class he must first prepare the lesson plan; then teach the class; and finally review his students' classwork. On the days he is absent for religious holy days, he prepares the lesson plans for his classes and reviews them with his substitute. He then receives and corrects the assignments his students have completed in his absence. [App. 68–70.] Although his pay is docked, he is still required to perform a substantial fraction of the duties for which his pay was intended to compensate him." *Id.*, at 24–25.

Appeals' theory that the employer has a duty to accept any reasonable accommodation proposal made by the employee as long as it does not result in "undue hardship," a remand to the District Court was appropriate to resolve the "undue hardship" issue. I do not understand why a remand is appropriate now. The Court of Appeals has already concluded that if no analysis of undue hardship is required, the Board's policy of granting three days of paid leave and additional days of unpaid leave for religious observances complies with the statute.[1] Neither that court nor the District Court saw any reason to make a special analysis of the "past and present administration of the personal business leave provisions of the collective-bargaining agreement." *Ante*, at 71.

In view of the record, the factual analysis the Court calls for may satisfy the demands of the Court's curious holding in *Icicle Seafoods, Inc.* v. *Worthington*, 475 U. S. 709, 714 (1986), but it cannot affect the outcome of this case. Whether the Board has administered the provisions for paid leave for secular purposes strictly or permissively has no bearing on Philbrook's legally insufficient complaint that he

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[1] "The school board argues that we should find that its longstanding accommodation of three days of paid leave and additional days of unpaid leave for religious observance constitutes a reasonable accommodation and thus satisfies its duty to accommodate, citing the Tenth Circuit's decision in *Pinsker* v. *Joint District No. 28J*, 735 F. 2d 388, 391 (10th Cir. 1984). The *Pinsker* court held that a policy allowing two days of paid leave for religious reasons and additional days of unpaid leave satisfied the duty to accommodate. We presume that Ansonia's leave policy is 'reasonable.' *And if Title VII's duty to accommodate were to be defined without reference to undue hardship, we would hold that the school board has satisfied its burden.* The duty to accommodate, however, cannot be defined without reference to undue hardship. In many circumstances, more than one accommodation could be called 'reasonable.' Where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business." 757 F. 2d 476, 484 (CA2 1985) (emphasis added).

has some but not enough leave for religious purposes.[1] The employer has no duty to provide Philbrook with additional days of paid leave. Nor can the uses for which the board has historically allowed personal leave days possibly create a duty to pay Philbrook to perform the work he missed on days of religious obligation.

Accordingly, I respectfully dissent from the part of the Court's judgment that remands the case for further proceedings.

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[1] Though it is not necessary to my conclusion, the teachers' modest use of personal business days indicates that they are not treated as general leave days. In the 1982–1983 school year, for example, only 2 of the 131 teachers in the school system used all three days; 80 used none. Plaintiff's Exhibit 18.

In addition, the Board has strictly administered the use of necessary personal business days, limiting their use to the purposes not enumerated in the contract. The School Superintendent testified that the use of these three days' leave is closely monitored. Teachers may take one of these days in their discretion, without giving a reason for their absence, but must notify the principal or their superior of their absence 48 hours in advance. The Superintendent testified that he insures that teachers do not use that one discretionary day with pay for any of the reasons specifically enumerated in the contract:

"Q: If, in fact, you find that a teacher has utilized that one day for one of the reasons specifically listed in the contract for which days are separately allotted, what action, if any, would you take?

"A: If I found out, they would be deducted a day's salary for that one day." App. 65.

The other two days of necessary personal leave must be approved by the Superintendent with 48 hours' notice. The Superintendent reviews the request for leave, denying it if he does not consider it to be a necessary personal day. If the employee takes the day nonetheless, he or she is docked a day's pay. *Id.*, at 54.

Appendix A

OPINION, UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 397 — August Term, 1984

(Argued: November 14, 1984 Decided: March 7, 1985)

Docket No. 84-7548

RONALD PHILBROOK,

Appellant,

— v. —

ANSONIA BOARD OF EDUCATION AND NICHOLAS COLLICELLI, DR. CHARLES J. CONNORS, KENNETH EATON, WILLIAM EVANS, DEL MATRICARIA, SUSAN SCHUMACHER, FAITH TINGLEY, ROBERT E. ZURAW, ANSONIAL FEDERATION OF TEACHERS, LOCAL1012, AFL-CIO, JOSE NEVES, KATHLEEN ROBERTS, MARY GHIRARDINI, DENNIS GLEASON, DOMINICK GOLIA, MAUREEN WILKINSON, AND GEORGETTE WILLIAMS,

Appellees.

Before:

OAKES and KEARSE, *Circuit Judges,* and POLLACK, *District Judge.**

Appeal from a judgment of the United States District Court for the District of Connecticut, Thomas F. Murphy, *Judge,* holding that a school teacher had failed to prove his claim of religious discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, and the First Amendment.

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* Of the Southern District of New York, sitting by designation.

Reversed and remanded.

David N. Rosen, New Haven, CT, *for Appellant.*

Thomas N. Sullivan, Hartford, CT (Robert J. Murphy, Hartford, CT, of counsel), *for Appellees Ansonia Board of Education and the Individual School Board Members.*

Robert F. McWeeney, Hartford, CT, *for Appellees Ansonia Federation of Teachers, Local 1012, and Union Officers.*

OAKES, *Circuit Judge:*

Ronald Philbrook, a high school teacher in Ansonia, Connecticut, appeals from a judgment of the United States District Court for the District of Connecticut, Thomas F. Murphy, Judge, after a bench trial, finding that he failed to prove his claim of religious discrimination in employment against the Ansonia Board of Education (the "school board") and the Ansonia Federation of Teachers, Local 1012 (the "union"). Philbrook, a member of the Worldwide Church of God, claims that the school board's leave policies violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 (1982), and the free exercise clause of the First Amendment. Reaching only the statutory issue, we reverse and remand.

BACKGROUND

Appellant has taught typing and business at Ansonia High School since 1962. Some time later he began studying and observing the teachings of the Worldwide Church of God. In February, 1968, he was baptized into the church, of which he remains a member. The tenets of the church require members to refrain from secular employment on certain designated holy days each year. These holy days are determined with reference to the Hebrew calendar. Thus they often fall on different days in different years. Several of these holy days usually fall during a school week. Appellant estimated that if he is to observe the required holy days he will have to miss approximately six school days each year.

The school board's leave policies, as outlined in collective bargaining agreements with the union, have changed over time:

A. In 1966, the school board and the union, then recognized as the exclusive bargaining representative for Ansonia's teachers, entered into an agreement that provided for five days' leave "for personal and or legal reasons." The agreement also provided for accident and sick leave but said nothing about leave for religious reasons.

B. The 1967-1968 contract provided for annual leave of 18 days, cumulative to a total of 150 days, for "personal illness, illness in the immediate family which requires the presence of the teacher, . . . compulsory court appearance as party or witness." It also provided that teachers could use annual leave for other reasons, such as "weddings," a "death in the immediate family," and "personal reasons," limiting weddings and death in the family to a specified number of days and allowing "personal reasons" leave only "at [the] Sup[erintenden]t's discretion." The agreement also stated that teachers could take up to three days' leave "for observance of Religious Holy Days which church laws make obligatory." Religious leave, however, could not be charged or accumulated as annual leave.

C. The 1968-1969 contract contained many of the same provisions, yet provided for three days per year for "legitimate and necessary personal business at the teacher's discretion," and included the three days for religious observance as annual leave days, which presumably were cumulative.

While none of these early agreements expressly stated that personal business leave could not be used for religious observance, it appears that the school board interpreted these categories as exclusive. Later contracts makes the exclusivity explicit. The 1969-1970 contract again allowed three days for personal business and three days for religious holidays, but the latter were no longer part of annual leave. Moreover, it stated that "[n]o annual leave, including accumulated days, shall be used for absence due to Religious Holidays in excess of 3 days per year." The 1970-1971 contract added a provision stating that personal business leave

days could not be used for any of a number of enumerated activities, including "[a]ny religious activity."[1]

The next modification of the restrictions on personal business leave is evinced by the agreement for 1978 through 1982. The contract still provided for three days, but only one was at the teacher's discretion. The other two would be authorized only after the teacher gave the reason for his or her absence. The current agreement, in effect until 1985, contains the same leave provisions.[2]

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[1] The agreement for 1971-1972 also changed the salary deduction for unauthorized absences. Previously, a teacher would have been docked 1/200 of his or her salary for an unauthorized absence, but after 1971 the deduction was increased to 1/180 of the teacher's annual salary.

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[2] The current contract, which, one would have to say, speaks by the book, provides in pertinent part:

A. Annual Leave

Eighteen (18) days of annual leave cumulative to 180 days shall be granted for personal illness and/or illness in the immediate family (spouse, children, parents, and family members residing in household), which requires the presence of the professional staff member, and within the limits stated below:

	limit of 2 days per
*1. Death in the immediate family	5 day limit each time
2. Family funeral attendance	1 day each time
3. Friend funeral attendance	1 day each time — limit of 2 days per year
*4. Immediate family wedding	1 day each time
*5. Immediate family graduation	1 day each time
*6. Immediate family religious ceremony (Ordination, Vows, Bar Mitzvah, Bas Mitzvah, First Communion, Baptism)	1 day each time
7. Official delegate to national veterans organization	1 day per year
8. Official delegate (President and/or Business Agent) to national or state teachers organization	1 day per year — without charge

[Footnote continued on following page]

[Footnote continued from previous page]

9. Official delegate (other than President and/or Business Agent) — (limit of 3) to national or state teachers organization	1 day per year
10. Mandated religious observance	3 days per year — without charge

Those holidays which are required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for absence due to religious holidays in excess of three days per year.

11. Necessary personal business	3 days total per year
a. Necessary personal business	1 day per year

Granted at the discretion of the professional staff member with 48 hour notification to the immediate supervisor. Professional staff member will note personal day on the form provided by Board of Education.

b. Necessary personal business with approval	2 days per year

Professional staff member must request the days for personal business on a form provided by the Board of Education forty-eight (48) hours prior to such leave. Reasons for such leave may be stated in general terms if the professional staff member is concerned with protecting the confidential nature of the personal business. The professional staff member shall make all reasonable efforts to plan and conduct personal business so that it does not conflict with assigned professional duties. Exceptions regarding the forty-eight (48) hour notice provision and/or use of prepared form may be made in cases of emergencies.

Necessary personal business shall not include (without limitations):

1. Marriage attendance or participation;
2. Day following marriage or wedding trip;
3. Attendance or participation in a sporting or recreational event;
4. Any religious observance;
5. Travel associated with any provision of annual leave;
6. Purposes set forth under annual leave or another leave provision of this contract.

*NOTE: Immediate family shall be defined as spouse, children, parents, stepparents, grandparents, brothers, sisters, parents-in-law, family members residing in the professional staff member's household.

Absence due to any judicial proceeding in which the professional staff member is a plaintiff or defendant or is a witness under subpeona shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days.

[Footnote continued on following page]

[Footnote continued from previous page]

Absence due to jury duty shall be considered as authorized leave and shall not be charged to annual leave. Immediately upon notice of the possibility of the teacher serving jury duty, such notice shall be communicated to the teacher's principal. All teachers shall make every effort to be excused from jury duty.

The Board may require satisfactory proof of illness after a professional staff member is absent for four (4) consecutive school days on account of illness. Such proof of illness may also be required of a professional staff member's immediate family member if the professional staff member is absent for four (4) consecutive school days on account of the immediate family member's illness.

For absence other than for personal illness and not authorized herein, a salary deduction equal to 1/180th of the annual salary shall be made.

Any travel by a professional staff member, conducted in connection with and/or at the time of any school holiday, vacation, school commencement in September or school termination in June shall be arranged where possible, in advance, so as not to conflict with assigned or required professional duties.

From 1967 through 1976, appellant took unauthorized absences for religious holidays in excess of three days per year, for which the school board docked appellant's salary. Although some of the contracts during this period appear to leave the reason for personal business absences to the teacher's discretion, appellant claims to have taken no personal business leave on church holy days. In 1976, however, appellant stopped taking unauthorized leaves for religious reasons, claiming that his family could not sustain the financial strain of the docked salary. He began to schedule required hospital visits on church holy days, and on several occasions he worked on a holy day.

Appellant claims to have sought relief from both school authorities and the union. The school board has always allowed appellant to take unpaid leave for religious holy days, but appellant has repeatedly suggested two other arrangements. On the one hand, appellant has asked that the school board allow personal business leave be used for religious observance. On the other hand, appellant has offered to pay the full cost of a substitute instead of being docked the larger pro rata salary deduction for observing religious holy days in excess of the three allotted by contract.[3] Moreover, he has agreed to supervise the substitute and to make up for days missed by doing meaningful school

[3] In 1984, it cost $30 per day to hire a substitute, while the school board would have docked appellant over $130 for one unauthorized absence.

work at other times. The school board has consistently rejected both proposals.

Appellant's legal battle seeking accommodation of his religious practices began in 1973 when he filed a complaint against the school board and the union with the Connecticut Commission on Human Rights and Opportunities ("CHRO") and the Equal Employment Opportunity Commission ("EEOC"). The CHRO found probable cause to believe that the school board's refusal to allow personal business leave to be used for religious observance constituted religious discrimination, and attempted conciliation. The CHRO's conciliation agreement proposed that the school board and the union agree to "amend [the leave provisions] . . . so not to deny employees the use of their accumulated personal business days for observance of Religious Holidays." The agreement also provided appellant with back pay compensation. The school board rejected the proposed conciliation.[4]

Soon thereafter the EEOC assumed jurisdiction and also found probable cause. The EEOC attempted conciliation between appellant and the union, but these efforts failed.[5] On September 19, 1977, the EEOC issued a right-to-sue letter.

Appellant filed his complaint in federal court on December 16, 1977, alleging that the school board's prohibition from using personal business leave for religious observance violated Title VII and the First Amendment. In addition to charging the school board and the union, appellant added the individual members of the school board and various present and former union officers as defendants. All parties moved for summary judgment, but on April 8, 1983, the district court denied the motions, finding that material facts were in dispute.

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[4] After the Connecticut Supreme Court decided *Corey v. Avco-Lycoming Division*, 163 Conn. 309, 307 A.2d 155 (1972), *cert. denied*, 409 U.S. 1116 (1973), limiting an employer's duty to accommodate employees' religious beliefs under the Connecticut Fair Employment Practice Act, the CHRO ended its conciliation efforts.

[5] In 1975, the union instituted a grievance proceeding against the school board on behalf of appellant. The only issue before the arbitrator, however, was the meaning of the Ansonia collective bargaining agreement. The arbitrator denied the grievance.

After a two-day trial, the district court held that appellant had failed to prove religious discrimination. The court's opinion first outlines the facts that were not in dispute. After reviewing appellant's testimony concerning his religious practices, the court declined to find appellant insincere in his religious beliefs, though it had "some doubts of his sincerity." The court made no finding, stating that "we draw no inference of insincerity without more facts. Neither do we find he was sincere." After reviewing what it deemed relevant Supreme Court case law, the court concluded that appellant failed to prove religious discrimination, because he had "not been placed by the School Board or any of its members or by the Union or any defendant officers thereof, in a position of violating his religion or losing his job." In addition, the court stated that it had no jurisdiction over the individual school board members or union officers under Title VII or 42 U.S.C. § 1983.

DISCUSSION

Appellant's Prima Facie Case

In this case of first impression, we begin by examining Title VII's prohibition against religious discrimination. Under Title VII, an employer cannot discriminate against any employee on the basis of the employee's religious beliefs unless the employer shows that he cannot "reasonably accommodate" the employee's religious needs without "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).* The parties assume

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* 42 U.S.C. § 2000e(j) provides:

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e-2(a) (1) provides, in pertinent part:

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

The legislative history provides little assistance in interpreting § 2000e(j). *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74-75 & n.9 (1977).

and we agree that Title VII requires the plaintiff to make out a prima facie case of discrimination, after which the burden shifts onto the employer to show that it cannot reasonably accommodate the plaintiff without undue hardship on the conduct of the employer's business. *See, e.g., Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 401 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979). While the district court omitted to apply this burden of proof sequence or to make the findings required under it, necessitating remand, we state the guidelines for the case on remand.

We first adopt the approach to plaintiff's prima facie case taken by several courts of appeal:

> A plaintiff in a [Title VII] case makes out a prima facie case of religious discrimination by proving: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement.

Turpen, 736 F.2d at 1026; *accord Brown v. General Motors Corp.*, 601 F.2d 956, 959 (8th Cir. 1979); *Anderson*, 589 F.2d at 401; *Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978). Moreover, we agree that a finding of probable cause by an administrative agency, such as the EEOC, though not determinative, is admissible to help establish this prima facie case. *See, e.g., Smith v. Universal Services, Inc.*, 454 F.2d 154, 157-58 (5th Cir. 1972). On the record before us plaintiff has almost certainly satisfied this prima facie standard.

We reject the school board's invitation to hold that appellant has failed to establish the sincerity of his religious beliefs. The district court expressly declined to make any such finding. In fact, on the record below, we would be inclined to reverse a finding of insincerity as clearly erroneous.

We acknowledge that it is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity — as opposed, of course, to the verity — of someone's religious beliefs in both the free exercise context, *see, e.g., United States*

v. Ballard, 322 U.S. 78, 86 (1944); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d. Cir. 1984); L. Tribe, *American Constitutional Law* § 14-11, at 859-61 (1979), and the Title VII context. We see no reason for not regarding the standard for sincerity under Title VII as that used in free exercise cases. *See Redmond*, 574 F.2d at 901 n.12; *cf. Lewis v. Califano*, 616 F.2d 73, 77-81 (3d Cir. 1980) (using free exercise standards for determining whether religious belief is a "justifiable cause" for declining surgery under the Social Security regulations). This court has recently held that a sincerity analysis is necessary in order to "differentiat[e] between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud." *Patrick*, 745 F.2d at 157. In *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981) (citations omitted), we outlined several factors that indicate insincerity, noting that "an adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief . . . or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine." The *Barber* court also stated that "the religion's size and history" is relevant to the sincerity determination. *Id.* The burden on plaintiff, however, is not a heavy one. We must avoid any test that might turn on "the factfinder's own idea of what a religion should resemble." L. Tribe, *supra*, at 861.

The school board argues that appellant's failure to take unpaid leave on holy days during the past several years shows that appellant has acted in a manner inconsistent with his "beliefs," and therefore that those beliefs were not sincerely held. We cannot agree. From 1968 through 1976 appellant accepted the docking of his pay to take off the holy days for which religious leave was not provided. After 1976 he worked on certain holy days because he could no longer afford the docking of his salary. We find it distinctly unpalatable for the school board to argue that a lack of sincerity was evidenced because after many years of paying for his extra holy days the appellant stopped paying and obeyed the school board's rules that forbade him from engaging in religious activity on extra days away from school. The school board's leave policy forced appellant to act in a way inconsistent with his religious belief. Appellant's claim that he was reacting

to financial pressure rebuts the inference of fraud from his actions. *Cf.* Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 Yale L.J. 350, 371 (1980) (arguing that for purposes of disallowing religious tax exemptions there should be "affirmative proof of fraud"); *see also Ballard*, 322 U.S. at 92-98 (Jackson, J., dissenting).

In addition, we note that, while the district court had "some doubts of his sincerity because of his vagueness and claimed poor memory of when and where he attended religious services," it wisely declined to make a finding of insincerity without "a full exposition of facts," *Patrick*, 745 F.2d at 157. Moreover, it correctly noted that even if appellant was not a regular churchgoer, it "would have trouble" in making a finding of insincerity. Appellant's financial compromise and failure to attend services regularly would not, by themselves, mean that he does not believe that he should not work on holy days. *Cf. Thomas v. Review Board*, 450 U.S. 707, 715 (1981) (courts are incompetent to arbitrate intrafaith differences where a church member's insincerity is at issue).

Turning to the remaining requirements of plaintiff's prima facie showing, appellant gave unrebutted testimony that he informed the school board and the union of his need to be absent on religious holy days, although it is not clear when the union became aware of appellant's needs. On remand, such a finding might be necessary to determine the amount of back pay appellant is entitled to receive, assuming that issue is reached. In addition, it seems clear that appellant suffered a detriment from the conflict between his religious practices and the employment requirements. The district court placed much reliance on the fact that appellant was not forced into a choice between his job and his religious beliefs, but we hold that such a choice cannot be distinguished from the choice here between giving up a portion of his salary and his religious beliefs. While we acknowledge that some courts have stated that discharge was required to make a prima facie showing of discrimination, *see, e.g., Brown*, 601 F.2d at 959, Title VII prohibits not only discrimination in hiring and firing but also discrimination "with respect to compensation, terms, conditions or privileges."

Finally, appellees claim that *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), bars appellant from making out a prima facie case of discrimination by simply claiming that appellee's leave policy is "less than all inclusive." In *Gilbert*, the Supreme Court held that an employer's failure to include pregnancy benefits in its health care plan was not, by itself, sex discrimination. The Court at one point stated that "pregnancy-related disabilities constitute an *addditional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike." *Id.* at 139 (emphasis in original). According to appellees, appellant's need for more than three days' leave for religious holy days is an "additional risk" unique to his faith.

Appellee's reliance on *Gilbert* is misplaced. *Gilbert* addresses whether a classification based on pregnancy was discriminatory on its face and whether the employees had shown that the health care plan had a discriminatory effect on the basis of sex in terms of benefits received. The language appellees rely on its simply part of an explanation why the employees had failed to show that the General Electric Plan had a discriminatory effect. Here, however, appellant has offered evidence that the Ansonia leave policy facially discriminates on the basis of religion: the collective bargaining agreements in effect since 1969 have explicitly stated that personal business leave days may not be used for "[a]ny religious activity" and thus have afforded some teachers all the leave they need for religious reasons while not extending that benefit to members of religious groups that have more than three holy days per year. Yet even if appellant's claims are analyzed as solely alleging discriminatory effect in this respect, appellees' agrument proves too much. Any religious belief can be characterized as an "additional risk." Title VII, at least as applied to religious discrimination, expressly assigns employers a duty to accommodate those beliefs. Moreover, the Supreme Court has recently held that Congress's enactment of the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), not only overturned the specific holding in *Gilbert* "but also rejected the test of discrimination employed by the Court in that case." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 103 S. Ct. 2622. 2627 (1983).

"Reasonable Accommodation" and "Undue Hardship"

The crucial issues in this case remaining for determination involve interpreting the meaning of and relationship between the terms "reasonable accommodation" and "undue hardship." The central precedent, of course, is *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the only case in which the Supreme Court has addressed "reasonable accommodation" and "undue hardship" under Title VII. In *Hardison*, the employee, like appellant Philbrook here, a member of the Worldwide Church of God, sought to be excused from work on Saturdays, the church's sabbath. *Id.* at 67. The employer operated a large maintenance and overhaul base around the clock. The employees' shift preferences were resolved on the basis of a seniority system outlined in a collective bargaining agreement. Hardison's problems arose when he transferred into a new division and lost his seniority. Prior to the transfer, he had used his seniority to observe the sabbath regularly. After the transfer, however, the union would not agree to a change of work assignments — which would allow Hardison to have Saturdays off — in violation of the seniority provisions of the collective bargaining agreement. *Id.* at 68. Hardison also proposed to work four days a week, but the proposal was rejected by TWA. The Court noted that

> Hardison's job was essential, and on weekends he was the only available person on his shift to perform it. To leave the position empty would have impaired supply shop functions, which were critical to airline operations; to fill Hardison's position with a supervisor or an employee from another area would simply have undermanned another operation; and to employ someone not regularly assigned to work Saturdays would have required TWA to pay premium wages.

Id. at 68-69.

The Supreme Court held that the failure to accept these proposed accommodations did not violate Title VII. Addressing what the Court considered the "principal issue" in the case, *id.* at 83 n.14, the Court concluded that the duty to accommodate does not take precedence over seniority rights enunciated in a collective bargaining agreement. *Id.* at 83. And, turning to the issue

more pertinent to this case, the Court held that Hardison's four-day work week proposals involved costs to TWA that amounted to "undue hardship." *Id.* at 84. The Court stated that "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.* Finally, the Court noted that giving Hardison Saturdays off by "incurring extra costs to secure a replacement for Hardison" would constitute a "privilege . . . allocated according to religious beliefs," *id.* at 84-85, which the Court saw as a form of reverse discrimination.

Hardison did not sound a death knell to the employer's duty to accommodate under Title VII. In *Anderson*, 589 F.2d at 402, the Ninth Circuit rejected a union's argument that any hypothetical hardship constitutes "undue hardship," noting that [u]ndue means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts." Similarly, the *Brown* court held that speculative costs to the employer could not discharge its burden of proving undue hardship. 601 F.2d at 961.

The school board argues that we should find that its longstanding accommodation of three days of paid leave and additional days of unpaid leave for religious observance constitutes a reasonable accommodation and thus satisfies its duty to accommodate, citing the Tenth Circuit's decision in *Pinsker v. Joint District No. 28J*, 735 F.2d 388, 391 (10th Cir. 1984). The *Pinsker* court held that a policy allowing two days of paid leave for religious reasons and additional days of unpaid leave satisfied the duty to accommodate. We presume that Ansonia's leave policy is also "reasonable." And if Title VII's duty to accommodate were to be defined without reference to undue hardship, we would hold that the school board has satisfied its burden. The duty to accommodate, however, cannot be defined without reference to undue hardship. In many circumstances, more than one accommodation could be called "reasonable." Where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business.

Although the courts interpreting Title VII's duty to accommodate have never expressly articulated this point, their analyses are consistent with this approach. In most cases, the court is called upon to assess only the employee's proposal; the court does not have to assess the propriety of the employer's offering one accommodation but rejecting the employee's proposed accommodation. *See Hardison, supra; Turpen, supra.* Nevertheless, the Fifth Circuit in *Turpen* did state, as we have suggested above, that the reasonableness and undue hardship questions were "interlocking." *Id.* at 1026. Previously, in *Brener v. Diagnostic Center Hospital,* 671 F.2d 141 (5th Cir. 1982), the Fifth Circuit had interpreted the duty to accommodate in the same way we do today. The *Brener* court analyzed the reasonableness of the employer's proposed accommodation, *id.* at 145-46, but went on to examine the employee's proposed accommodations to determine whether any did not cause the employer undue hardship. The implication is that, even if the employer proposes a reasonable accommodation it has not satisfied its duty to accommodate unless the employee's suggested accommodations would lead to greater than de minimis cost. The EEOC's recent guidelines on religious discrimination — while not dispositive of the interpretation of Title VII, *see Gilbert,* 429 U.S. at 140-42 — also support the approach we above suggest. *See* 29 C.F.R. § 1605.2(c) (2) (1984).[7]

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[7] Section 1605.2(c) (2) provides:

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunites [*sic*], such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

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As noted, appellant has offered two proposed accommodations — the use of personal business leave for religious observance and the payment of the cost of a substitute in exchange for not being docked salary for religious leave in excess of three days. On remand the district court must determine whether accepting either of appellant's proposed accommodations would cause undue hardship. We note, however, that on the record before us it appears that neither of the accommodations would lead to greater than de minimis costs.

Appellant clearly prefers that the school board allow him to use personal business leave for religious holy days. The critical factual question concerning this proposal is the past and current scope of the personal business leave provisions. As noted earlier, from 1968 through 1977 three personal business days could be taken at the teacher's discretion, and from 1977 to the present, at least one could be taken at the teacher's discretion. This leaves in the air whether any such day may be taken for any reason except those specifically mentioned, such as religious reasons. Thus, the question is open whether they are usable for various secular purposes, including activities not inconsistent with religious observance. The provision does include the words "legitimate and necessary," but left unsaid is whether leaving the reason to the teacher's discretion abrogates this limiting language. Appellant claims that the provision allows attendance at charity meetings, while the school board argues that its scope is much more narrow. One of the appellant's exhibits at trial — entitled "Teacher Absence Report" — indicates that many teachers have taken at least one personal business day a year and some more than one. It also appears that personal business days are taken more frequently than religious holy days. The presence of a contract provision that allows leave for limited secular activities, such as sick leave or leave for court appearances, does not show that additional paid leave for religious observance in lieu of personal business leave would not cause undue hardship. Employers and unions must be free to outline specific types of paid leaves in a contract without the threat of being charged with religious discrimination. But if the personal business leave provision is as broad as appellant claims, it becomes difficult to believe that drop-

ping the religious exception causes undue hardship.[1]

Even if the district court finds that the personal business accommodation would lead to undue hardship — or if the school board and the union were to agree to take the personal business leave provisions out of the contract altogether — the district court must assess the cost of accepting appellant's substitute proposal. Appellant has offered to pay for a substitute and even to work on other days to make up for the time missed. While there is some testimony below concerning the cost of using substitutes, the court never focused on the cost of appellant's proposed accommodation. The Superintendent of Schools testified that it is difficult to find certified substitutes, especially those qualified to teach typing and business; that the quality of learning with a substitute is low; that substitutes often have difficulty keeping discipline; and that when substitutes teach classroom equipment is often damaged. Yet several questions still must be addressed. Because presumably appellant would know about his upcoming religious holy days well in advance, it is possible that he can work out an arrangement that avoids the traditional problems of finding a qualified substitute at the last minute. While we recognize the difficulty of discipline in a high school classroom, it may also be that discipline and teaching difficulties can be avoided in a business course by having appellant closely supervise the substitute.

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[1] On remand, the district court must make findings about the use of personal business leave from 1968 through the present. Appellant does not only seek prospective relief; he also seeks back pay.

In its brief on appeal, the school board seems to assume that the burden is on appellant to show that the personal business accommodation would not cause undue hardship. It is not: once appellant has made out a prima facie case, the school board has the burden of showing that an accommodation *would* cause undue hardship.

On the record before us, we decline to accept the school board's argument that the substitute accommodation as a matter of law poses greater than de minimis costs. This case thus might well be distinguished from *Hardison*. The *Hardison* Court held that a need for premium pay or a loss of efficiency can cause undue hardship. Under the proposed substitute accommodation, the school board would not be paying premium wages. Appellant is not asking to have his religious activities subsidized, as the school board claims. Appellant has offered to pay the cost of the substitute and to make up for time off: appellant does not ask for payment for time when he is not working.[9] Moreover, we are not ready to hold that the school board has shown that there will be a greater than de minimis loss in efficiency. The *Hardison* Court held that using a supervisor or an employee from another area amounted to a greater than de minimis cost because it left other operations undermanned. The same problems may not arise under the substitute accommodation. One would suppose that the school system has the ability to find qualified substitutes. If appellant communicates with the substitute before and after the days he must miss, there may well be no appreciable loss in the quality of education, where the number of additional

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[9] The district court also thought appellant wanted something for nothing. Certainly it was overlooking his offer to work extra hours to make up for days missed. The court noted an analogous federal statute providing a government employee with "abstention from work during certain periods of time" for religious reasons if the employee "engage[s] in overtime work for time lost," 5 U.S.C. § 5550a (1982), yet the court incorrectly stated that appellant "agrees with everything but the work part." The statute appears to support, not weaken, appellant's claim.

substitute days appears to be three.[10] *Cf. Turpen*, 736 F.2d at 1028 & n.6 (holding that it was not clearly erroneous for the district court to find that a substitute accommodation caused undue hardship when there was no built-in system for substitution).

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[10] 29 C.F.R. § 1605.2(d) (1) (i) advocates the use of "voluntary substitutes" as an example of reasonable accommodation without undue hardship:

(i) Voluntary Substitutes and "Swaps"

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

The school board also suggests that accommodating appellant would constitute preferential treatment. We disagree. While we acknowledge the cautionary language of the Supreme Court in *Hardison*, we do not interpret *Hardison* as vitiating the employer's duty to accommodate. Appellant's proposal for the use of personal business leave for religious observance is not one seeking preferential treatment. He is asking the school board and the union to change its leave policy as applied to everyone. Nor would his substitute accommodation allocate a privilege "according to religious beliefs." *Hardison*, 432 U.S. at 85. Appellant has asked to be treated differently; he has not asked for privileged treatment. In exchange for additional days off, he is willing to make up for time off *and* pay for the substitute. Differential treatment cannot be equated with privileged treatment. Accepting the school board's argument would "preclude all forms of accommodation and defeat the very purpose behind § 2000e(j)." *Brown*, 601 F.2d at 962.[11]

[11] Perhaps *Hardison* may be read as equating "undue hardship" with preferential treatment. That is to say, accepting an accommodation that would lead to greater than de minimis costs to the employer constitutes under *Hardison* preferential treatment when looked at from the perspective of the employees. Yet accepting a proposal that would not cause undue hardship, does not constitute preferential treatment. We need not reach this question, however.

Moreover, in light of our remand, we do not address the hypothetical question whether accepting either of appellant's proposed accommodations constitutes an unconstitutional establishment of religion. We do note, however, that several courts of appeals have held that Title VII's duty to accommodate does not run afoul of the First Amendment. *See McDaniel v. Essex International, Inc.*, 696 F.2d 34, 37 (6th Cir. 1982); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1244-46 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 453-55 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981); *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 43-44 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 63 (1977).

Union Liability

Finally, we reject the union's argument that we find it not liable for any religious discrimination on the record before us. Title VII places a duty on unions not "to cause or attempt to cause an employer to discriminate against an individual." 42 U.S.C. § 2000e-2(c) (3). We have stated previously that a union's liability depends on its "responsibility for the discrimination." *EEOC v. Enterprise Association Steamfitters Local No. 638*, 542 F.2d 579, 586 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977). This conclusion is consistent with that of other courts. *See, e.g., Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 42-43 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 63 (1977). In *Hardison*, the Eighth Circuit wrote that "the union may be held liable if it purposefully acts or refuses to act in a manner which prevents or obstructs a reasonable accommodation by the employer so as to cause the employer to discriminate." *Id.* at 42. In this case, various union officers testified that they had proposed changes in the collective bargaining agreement's leave policies, but all were rejected. Appellant claims that the union never really pushed for these changes. The union did join appellant in seeking arbitration on appellant's leave policy grievance, but, at the same time, it appears that the union declined to enter into an EEOC conciliation agreement with appellant. Clearly, any further discussion of the issue must await a more detailed development of the facts.[12]

Judgment reversed and remanded for proceedings not inconsistent with the foregoing.

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[12] The district court held it had no "jurisdiction" over the individual school board members and the union officers. Appellant does not raise this issue on appeal and, therefore, we do not address it.

While we reach only the Title VII issues, the First Amendment issues remain open, if appellant should lose on the Title VII issues on remand.

POLLACK, *Senior District Judge* (dissenting):

I dissent and vote to affirm on the unassailable facts found below, substantially for the reasons and authorities contained in District Judge Thomas F. Murphy's persuasive opinion.

The issue in this case is whether the School Board should be forced to pay a teacher for not working. There is no indication that the School Board, the Union, or the collective bargaining agreement intended to discriminate against anyone, including plaintiff, on the basis of religion. The School Board and Union, and the membership of the latter, adopted a facially neutral policy giving each employee three days of paid religious leave and three days of paid secular personal leave, which were not to be interchangeable. If an employee wished to take additional religious leave, he was privileged to do so at his own cost without suffering any impact on his employment status.

The majority views the School Board's policy as one that facially discriminates on the basis of religion because it "affords some teachers all the leave they need for religious reasons but does not extend that benefit to members of religious groups that have more than three holy days per year." However, neither case law nor the legislative history of the statute support the majority's expansive position that an employer "discriminates" within the meaning of Title VII if he refuses to give an employee more than three paid religious days when the employee desires more paid leave.

The legislative history makes it clear that Title VII was not concerned with the "no work-no pay" situation. Rather, as the Senate Floor managers explained, the statute was concerned with discriminatory practices, i.e., the situation where an employer

> "refuse[d] to hire or to discharge any individual or otherwise to discriminate against him with respect to compensation or terms or conditions of employment because of such individual's race, color, religion, sex, or national origin *in such a way as to deprive them of employment opportunities or otherwise affect adversely their employment status.*"

110 Cong. Rec. 7212 (1964) (April 8, 1964) (Interpretative Memorandum of Title VII submitted by Senators Case and Clark) (emphasis added).

Moreover, the nature of the discrimination that lies at the base of Title VII matters was starkly explained in language that admits of no confusion. The Senate sponsors stated that:

> "To discriminate is to make distinctions or differences in the treatment of employees . . ."

Id. at 7218.

Supreme Court opinions also emphasize that Congress enacted Title VII in order to "remov[e] artificial, arbitrary, and unnecessary barriers to employment . . ." *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). As the Court reiterated in *Connecticut v. Teal*, 457 U.S. 440 (1982), "Title VII strives to achieve equality of opportunity by rooting out 'artificial, arbitrary and unnecessary' employer-created barriers to *professional development.*" *Id.* at 451 (emphasis added).

The leave policy at issue here does not make distinctions between employees or deny plaintiff the opportunity to pursue his employment and yet have time off to observe his religious holy days. This is not a case where plaintiff is denied employment because his religious beliefs preclude him from working on certain days. *See, e.g., Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972). Nor is plaintiff subject to discharge because his religion forbids him to work on these days. *See, e.g., Brown v. General Motors Corp.*, 601 F.2d 956 (1979). Likewise, the policy has no adverse impact on plaintiff's opportunities for advancement; plaintiff has not been denied a promotion because of his religious beliefs. *See, e.g., Haring v. Blumenthal*, 471 F. Supp. 1172 (S.D.N.Y. 1979).

The School Board's policy neither deprives the plaintiff of employment opportunities nor adversely affects his employment status. As Judge Murphy succinctly stated, "[P]laintiff could go without let or hindrance whenever and wherever he wished" (Op. at 13) — but at his own expense. Since the policy does not "discriminate" within Title VII's use and meaning of that term, the statute may not be invoked against the School Board.

It is also clear that the Board has agreeably and reasonably accommodated the plaintiff. Recently, in *Pinsker v. Joint District*

No. 28J, 735 F.2d 388 (10th Cir. 1984), the Tenth Circuit held that a school board made a reasonable accommodation by permitting a teacher to take unpaid leave for religious observance. In *Pinsker*, teachers had a pool of 12 days of paid leave, of which two could be used for "special leave" purposes including religious observance. Plaintiff argued that Title VII required the Board to adopt a leave policy that was less burdensome to religious practices. The court disagreed, stating that the statute does not require employees to "accommodate the employee's practices in such a way that spares the employee any cost whatsoever." *Id.* at 390-91.

In *Pinsker*, the court also held that

> "[d]efendant's policy and practices jeopardized neither [plaintiff's] job nor his observation of religious holidays. Because teachers are likely to have not only different religions but also different degrees of devotion to their religions, a school district cannot be expected to negotiate leave policies broad enough to suit every employee's religious needs perfectly."

Id. at 391.

The neutral leave policy challenged here is embodied in a valid collective bargaining agreement. "Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy . . ." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977). Where, as here, the agreement neither impairs employment status nor imposes any artificial, arbitrary, and unnecessary barriers to employment, then, as the Supreme Court stated in *Hardison*, "we do not believe that the duty to accommodate requires [the employer] to take steps inconsistent with the otherwise valid [collective bargaining agreement]." *Id.* Paid leave from employment is neither contractually nor Constitutionally mandated.

Since the School Board's leave policy does not discriminate on the basis of religion, plaintiff failed — as early as the close of his case — to make out a prima facie case. Consequently, the judgment of dismissal should be affirmed.

Appendix B

ORDER, UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of June one thousand nine hundred and eighty five.

- - - - - - - - - - - - - - - - - -

RONALD PHILBROOK,

Appellant,

v. 84-7548

ANSONIA BOARD OF EDUCATION AND NICHOLAS COLLICELLI, DR. CHARLES J. CONNORS, KENNETH EATON, WILLIAM EVANS, DEL MATRICARIA, SUSAN SCHUMACHER, FAITH TINGLEY, ROBERT E. ZURAW, ANSONIA FEDERATION OF TEACHERS, LOCAL 1012, AFL-CIO, JOSE NEVES, KATHLEEN ROBERTS, MARY GHIRARDINI, DENNIS GLEASON, DOMINICK GOLIA, MAUREEN WILKINSON, AND GEORGETTE WILLIAMS,

- - - - - - - - - - - - - - - - - - Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellees, Ansonia Board of Education, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that the said petition for rehearing is DENIED.

It is further noted that a poll of the judges in regular active service having been taken on the suggestion for rehearing in banc and there being no majority in favor thereof, rehearing in banc is DENIED.

Elaine B. Goldsmith
Clerk

Appendix C

MEMORANDUM, UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

RONALD PHILBROOK
Plaintiff

vs.

ANSONIA BOARD OF EDUCATION, and NICHOLAS COLLICELLI, DR. CHARLES J. CONNORS, KENNETH EATON, WILLIAM EVANS, DEL MATRICARIA, and SUSAN SCHUMACHER (as President), and FAITH TINGLEY (as Secretary), individually and as members of said Board, ROBERT E. ZURAW, individually and as Superintendent of the Ansonia School System, and ANSONIA FEDERATION OF TEACHERS, LOCAL 1012, AFL-CIO, and JOSE NEVES, KATHLEEN ROBERTS, MARY GHIRARDINI, DENNIS GLEASON, DOMINICK BROGOLIA, MAUREEN WILKINSON, and GEORGETTE WILLIAMS, individually and as officers of said Local
Defendants

CIVIL ACTION

N 77-489

MEMORANDUM

MURPHY, D.J.

Ronald Philbrook, a school teacher, sues his employer Ansonia Board of Education and its individual members and also his Union, Ansonia Federation of Teachers, Local 1012 AFL-CIO, and its individual officers for violation of his First Amendment right of the free exercise of religion pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq*, and 42 U.S.C. §1983. Our jurisdiction is derived from 28 U.S.C. §1331 and §1343 and 42 U.S.C. §2000e-5 (f) (3).

Whether we have jurisdiction of the individual members of the

School District under "1983" and the officers of the Union without allegations of diversity of citizenship will be discussed later as will the question of the immunity of such individuals under *Harlow vs. Fitzgerald*, 457 U.S. 800 (1982).

Most of the facts were not in dispute in this two day trial including the necessary jurisdictional prerequisites of filing with the EEOC and its right to sue letter.[1]

Plaintiff's complaint alleges that defendants have caused him to lose pay for the days he is required to be absent from work for religious observances although no pay is deducted for non religious personal business. This practice he claims violates his rights under the First Amendment and Title VII of the Civil Rights Act of 1964.

Plaintiff's brief after trial poses the issue as follows: "Plaintiff's contention is that the refusal of annual leave for religious observances, when it is permitted for a wide variety of secular purposes, violates his rights under both the First Amendment and Title VII of the Civil Rights Act of 1964." Defendant School Board's brief phrases the issue as follows: This case presents the questions whether the defendant Ansonia Board of Education . . . is obliged under the free exercise clause of the First Amendment and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 to grant the plaintiff, a public high school teacher, leave with pay to observe religious holy days occurring during the school year."

The union suggests the central question is: "Does a collective labor contract providing that persons are required to work only 182 days per year violate the First Amendment and Title VII of the Civil Rights Act of 1964, where it grants a total of 18 days paid annual leave for various purposes including three days for religious holy days observance and permits additional religious holydays to be taken without pay."

The facts are not in dispute. Plaintiff has been a teacher of business and typing at Ansonia High School since 1962. In 1968 he became a member of the Worldwide Church of God by baptism. As such he must abstain from servile work on certain designated holy days of his church. He identified the holy days

1. Although the right to sue letter refers only to the charge against Ansonia School system its reference numbers are to both the school and the Union.

as The Passover, Days of Unleavened Bread, Days of Pentecost, Feast of Trumpets, Day of Atonement and Feast of Tabernacles. Such days are usually in September and October. The dates of these days, he said, vary from year to year and average about six per year.

1967, not 1968 as plaintiff testified, was the year when the Union (AFT), the bargaining representative of the teachers at Ansonia High School, negotiated the first of a series of contracts between the Ansonia Board of Education and the teachers. (Exhibit 3) There are separate contracts for the succeeding years.

A summary of plaintiff's employment by the school board, the Union's participation as the teachers' representative in labor matters, plaintiff's church affiliation and attendances at religious services, and the various collective bargaining agreements will serve to place the issue in focus.

Plaintiff became a teacher of typing and business at Ansonia High School in 1962. In 1968 he was baptized into the Worldwide Church of God which requires members to refrain from secular work on holy days. These holy days we are told are found in the Old and New Testament of the Bible and do not necessarily fall on the same day each year and are fixed each year by the Church using the Hebrew calendar wherein the new moon is the first day of the month. One of the exhibits in evidence explains this in some detail but not for all of the years involved. There were no specific dates identified by oral testimony and no specific biblical reference given for verification.

Two pamphlets in evidence, *God's Sacred Calendar, 1971-1972* (Exhibit 12) and *Pagan Holidays or God's Holydays "Which"* (Exhibit 13) give some explanation and biblical history but not sufficient to fix with any certainty the days included in the lawsuit nor did plaintiff attempt to identify such holy days for any relevant period although Exhibit 14 contains the days in the years from October 27, 1967 to October 12, 1979.

Prior to the collective bargaining agreement there was a rather loose system of teachers' authorized paid absences for a variety of purposes and some permissible accumulation of unused leave which is not relevant to the issues in this case. In the year 1968, however, the Ansonia Federation of Teachers (Union) was recognized as the exclusive bargaining representative of the teachers and it negotiated the contract which included in

ARTICLE V specific paid leave days applicable to many contingencies. (Exhibit 3) This contract for the school year 1968-1969 has 18 leave days. From a non limit for compulsory attendance in Court, five days for death in the family, three for church religious obligations and three for personal business. All leaves in excess of the allowed leaves subject to $25 a day deduction from pay. We find it appropriate to reproduce ARTICLE V of the 1968-1969 contract and the paragraph in succeeding contracts with reference to Religious Holy days.

1968-1969 Contract

ARTICLE V
LEAVE PROVISIONS

A. Annual Leave

Eighteen (18) days of annual leave cumulative to 150 days shall be granted for personal illness, illness in the immediate family which requires the presence of the teacher, and/or for the reasons, and within the limits stated below:

1. Compulsory court appearance as party or witness .....no limit
2. Death in the immediate family .....5 day limit
3. Funerals
   a) family .....1 day
   b) friend.....1 day per year
4. Attendance of a wedding on a school day . 1 day
5. Graduation, ordination, etc.....1 day
6. Official delegate to National Veterans Organization .....3 days per year
7. Religious Holy Days which church laws make obligatory .....3 days per year
8. Legitimate and necessary personal business at the teacher's discretion (but not including marriage or travel for personal or family convenience)..... 3 days per year

For absences for personal illness in excess of accumulated leave, a salary deduction of twenty-five (25) dollars shall be made for each day. Proof of illness may be required by the Board at its discretion.

For absences other than for personal illness and not authorized herein, a salary deduction equal to 1/200th of the annual salary shall be made.

In all instances, reasons for absence shall be reported on appropriate forms. Except in emergencies, applications for leave shall be made at least three (3) days in advance.

B. Sabatical Leave

For the purpose of encouraging professional growth and improvement of the local school program through such growth, the Board shall determine annually the number of teachers who may be absent on sabbatical leave, subject to the following conditions:

All succeeding yearly contracts up to and including June 30, 1985 contain the following paragraph with reference to Religious Holy Days.

> "Absence, not in excess of 3 days per year, for observance of Religious Holidays, which absence is required by and obligatory due to written denominational law shall *be considered as authorized leave and shall not be charged to annual leave, including accumulated days.* No annual leave, including accumulated days, shall be used for absence due to Religious Holidays in excess of three days per year." (Emphasis added)

Plaintiff's complaint filed December 16, 1977 has several different allegations describing his claim.

Under a heading entitled Introduction and Jurisdiction he states "The defendants have caused plaintiff to lose pay for days he is required to be absent from work for religious observances, although no pay is deducted for absences for non-religious personal business." Also that "he has for ten years been a baptized member of the Worldwide Church of God . . . that as part of the practice of his religion, plaintiff is required to observe certain annual Holy Days . . . approximately five to ten of these days each will fall on days when school is in session. The plaintiff cannot work on these days and must attend church."

When plaintiff joined the Worldwide Church of God (February 1968) he testified that he was able to use his annual personal leave time for observance of his church holy days. Plaintiff was in error on this score. His error was that he did not become a member of the Worldwide Church of God until February 1968, according to his own testimony, and at that time the Union contract for 1967-1968 provided for only three days religious leave and additional days could not be charged against annual leave. However, by the first Board and Union contract plaintiff has not been permitted to use his personal leave time for religious observances since he became a member of the Worldwide Church of God but is permitted "three days each year for religious observances" and "18 days are permitted for personal and sick leave" and "three days as official delegate to a national veterans' organization" but not to be spent for "religious observances" and an additional three may be spent for "legitimate and necessary personal business at teacher's discretion — [but] "shall not include any religious activity."

The next union negotiated contract for 1969-1970 (Exhibit 4) ARTICLE V, Leave Provisions reads: "absence, not in excess of 3 days per year, for observance of Religious Holidays, which absence is required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for absence due to Religious Holidays in excess of three days per year." Because of the last sentence, plaintiff argues it accommodates Jewish teachers in three holy days but no others who were willing to charge the extra days to personal business or other annual leave category.

In the contract, 1970-1971 (Exhibit 5) plaintiff stresses that a change in ARTICLE V, Leave Provisions relating to personal business namely what we capitalize, "6. Legitimate and necessary personal business at the teacher's discretion, *subject to other* provisions of this Article . . . 3 days per year. Personal business shall not include (without limitation) 1. Any marriage attendance or participation. 2. Attendance at any sport or recreational event. 3. Travel in connection with 1 through 5 above or any travel associated with any activity that does not constitute personal

business. 4. Purposes set forth in 1 through 5 above. 5. ANY RELIGIOUS ACTIVITY."

After 1970-1971 school year to date, the leave provisions have remained the same. The collective bargaining agreements afford all teachers a total of eighteen days of paid leave for illness and other purposes cumulative annually. It should be noted that Boards of Education are required by statute to grant teachers fifteen days of paid leave for absences due to illness cumulative to one hundred and fifty days. Conn. Gen. Stat. §10-156.

Plaintiff admitted that he has not been docked pay since the school year 1976-1977 for any religious observances and that was because his family started to "drool" as he said and he began to compromise. "I would set up an appointment when I should have been in a church observance either in the Veterans Administration Hospital or for other medical reasons or just regular general sickness that may have occurred and schedule them for a religious holy day." He also testified that on some occasions he actually went to work on a religious holy day. He did not know how many and "guessed" approximately 6 or so that may have fallen on school days, and that he has never taken any personal business days for religious observance that he can recall because he was trying to be completely honest with the contract. He could not remember whether he ever took any personal business days for any reason but he was sure he did some time ago. Nor could he remember if he did within the last six to seven years. He admitted that the annual leave is fixed as to the number of days but it can be accumulated and he admitted that as of the time of trial he had accumulated 80 days.

On cross examination he was vague as to where he observed holy days. We quote one answer: "At times in the location of the church where it would meet or at home or if I was to be at the hospital or wherever, I would observe it there." He was specifically asked where in the year 1983 he observed and answered "In Wallingford. We used the school — a couple of them in Meriden, the Junior Middle School." In answer to the question, were there other places, he replied, "There were other places when I was sick. In some cases I went into work." When asked if there was a person in charge at the school in Meriden, he thought it might have been a minister named Mr. Wooldridge but when he was reminded we were talking about 1983 he said

no he walked out and went to work, and then admitted that he did not attend the services in 1983 at the junior high school. He agreed that in the school years of 1976, 1977, 1978 and 1979 he attended only three services each year. He testified that in connection with the Veterans Administration Hospital he was being treated as an outpatient and would make appointments to meet the clinician. Although this would not be attending church services he did not have to do servile work (thus he would not fulfill his church obligation but he would charge it under the collective bargaining agreement. He was not asked if this was fair.

He admitted that between 1974 and 1983 on the occasions when he took more days for religious observance than were permitted by the contract, he was not threatened with any reprisals or dismissals and was unable to tell how much money he lost in pay for the school year 1976 without looking at the documents nor could he remember the number of days that he took as holy days for which he was not paid during the years of 1976, 1975 or 1974, but he allowed that his claim no matter what it was in money, placed an undue burden on him in the practice of his religion.

He also agreed that the statement contained in defendants' Exhibit B, a letter signed by James R. Rosenthal, an official of his church, addressed to him, which states that one of the sanctions against a member of the Worldwide Church of God for not observing religious days, is the loss of eternal life.

A time consuming analysis of exhibits, introduced with no further explanation, of plaintiff's absences from school for years from 1971-1983 reveals an astounding record of 257 absences. It includes 178 days under the category "illness," 8 days for "personal business," 39 days for "religious observances" and 8 being charged under ARTICLE V A 1-5, and only 18 days' pay being deducted amounting to $1,231.84.

But most amazing to us and not a word during trial, is the 178 days absence for "illness" and more particularly the coincidence of number of days each succeeding year — 15, *11*, *11*, 12, *18*, *18*, 17, *18*, 25, *18*, 10, 5 — almost 15 days per year.

The School Board argues that the free exercise of religion is tested in part by "sincerity," and that plaintiff's own testimony showed he was not sincere in his espoused religion. We did not have such impression because we found it very difficult to measure. We have some doubts of his sincerity because of his

vagueness and claimed poor memory of when and where he attended religious services and the absence of witnesses, including his wife. We mean people who saw him and possibly discussed religious matters with him. But we must confess that even with such evidence we would have trouble in making a finding of insincerity. It is such a purely mental experience and mere presence at church or some place of observance cannot be the cue.

We do note, however, that plaintiff resides in Ansonia and the religious services or assemblies he testified he attended were in Wallingford and Meriden schools — each approximately 3/4 of an hour away. But we draw no inference of insincerity without more facts. Neither do we find he was sincere.

In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) the Supreme Court was confronted with the then accommodation "guideline of the Equal Employment Opportunity Commission (EEOC), 29 CFR § 1605.1(b) (1968)" required, as the Act itself now does by 42 U.S.C. §2000e(j) (1970 ed. Supp. V).

In Hardison the issue also concerned a member of the Worldwide Church of God who by his own choice had changed his working status when he changed his shift. Being on another job in another building he became subject to a different seniority list and was asked to work on Saturdays when another employee went on vacation. TWA asked the Union to seek a change of work assignments for him but the Union was unwilling to violate the seniority provisions of the collective bargaining contract and suggested that Hardison work only 4 days a week. The company rejected the suggestion because he was the only available person on the shift to perform his job and it would not leave the position empty which was critical to airline operations and to employ someone not regularly assigned to work on Saturday would have required it to pay premium wages. When an accommodation was not reached, Hardison refused to report for work on Saturday. After a hearing he was discharged for insubordination. The District Court ruled in a suit brought under Title VII that the Union's duty to accommodate Hardison's Relief did not require it to ignore its seniority system as Hardison appeared to claim. The lower court held that "TWA had satisfied its 'reasonable accommodations' obligation, and any further accommodation would have worked an undue hardship on the company." The Supreme Court agreed with the District Court.

In writing for the Court Mr. Justice White held:

> "We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. The issue is important and warrants some discussion." *id.* at 79 (footnote omitted)

and concluded:

> "As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath." *id.* at 85

The free exercise of religion is not subject to arbitrary external power. Plaintiff was not subject to *any* power to attend or not attend any holy day service. He could go without let or hindrance whenever and wherever he wished. He might lose some pay or even his job. The plaintiff did not want it that free. He wanted it to be free as far as his desire or obligation permitted plus pay. This is why he said he did not exercise his "unfettered right to worship, it would cost him money — not that he was prevented." He testified he used to go even after he used his three days but he got tired of having to lose pay for not working.

§2000e-2(j) specifically prohibits an employer granting preferential treatment to any individual because of race, color, religion, etc. But there must be a reasonable accommodation by the

employer, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1977). Congress got the message as it related to Government employees and the next year (1978) it passed and the President approved P.L. 95-390, 5 U.S.C. 5550a, which provides for Government employees' compensatory "*time off*" for religious observances, wherein an employee who *elects to work* certain *overtime* is granted equal compensatory *time off* from his scheduled tour of duty (in lieu of overtime pay) for such religious reasons. In sum, the accommodation is *overtime work* for equal compensatory *time off* — plaintiff agrees with everything except the work part. He received time off after 3 paid days *without pay*.

The Union called all of its present and former officers, most of whom testified that the plaintiff never asked them for any help or advice. But all were willing to help if asked and spoke in favor of increasing the various off free days with pay.

The president, Gleason, was very active in trying to get all different kinds of relief for plaintiff and from the Board of Education — all without success. Including his most recent request for 25 days more of annual leave for all teachers and expansion of the days for religious and secular purposes.

Plaintiff through his Union filed a grievance concerning deductions from his salary for absences over and above the three days for religious observances in the year 1974 totaling $412.05. A hearing in March 1975 by the American Arbitration Association resulted in favor of the School Board.

The action against the individual members of the School Board is not authorized by the Civil Rights Act of 1964, 24 U.S.C. §§2000e *et seq*. They are not plaintiff's employers and there is no allegation or proof that there is diversity of citizenship between plaintiff and any of them. This leaves only the possibility of jurisdiction as against them, the claim that they violated "1983." Assuming that such jurisdiction exists on that theory there was not one iota of proof to support the charge that any such individual defendant member of the School Board committed any constitutional tort against plaintiff or indeed against any one else.

As for the individual Union officers named as defendants they too are not employers of plaintiff. They are officers of the Union and are not proper parties in a Civil Rights Act of 1964 case and of course cannot be sued under a "1983" claim. Most of them testified that they did not even know plaintiff and denied that

they were ever asked by him to do anything for him. There was no allegation or proof of diversity of citizenship as between any of them and plaintiff — only Gleason, President and business agent of the Union, took any active part relating to plaintiff and he did all plaintiff asked and more. On the question of asking for more money he allowed that "fairness in asking for more money is never considered." As to these individual defendant officers of the Union we find that we have no jurisdiction of any kind and the complaint must be dismissed for that reason alone, but if we are in error, the complaint is dismissed for failure to prove any violation under any statute as to them.

It has been suggested that defendants individual members of the School Board have qualified immunity under *Harlow v. Fitzgerald, supra.* That case concerned immunity relating to government officials. But *Wood et al v. Strickland et al,* 420 U.S. 308 (1975), a "1983" action is relevant. We are satisfied that under *Wood* each defendant School Board member has a qualified good faith immunity from liability for damages under both "1983" and the Civil Rights Act of 1964. But they do not need it in this case because plaintiff's case is being dismissed against all defendants for failure of proof.

In sum plaintiff has not been placed by the School Board or any of its members or by the Union or any defendant officers thereof, in a position of violating his religion or losing his job. *Thomas v. Review Board of Indiana,* 450 U.S. 707 (1980); *Sheabert v. Verner,* 374 U.S. 398 (1962) and *Hardison, supra,* and his complaint is dismissed against all defendants for failure to prove by a preponderance of evidence.

Accordingly the Clerk is directed to enter judgment dismissing the complaint and enter judgment for all of the defendants with costs.

Let this Memorandum stand as our findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Thomas F. Murphy
United States District Judge

Dated: May 18, 1984

90-1664

FILED
MAY 23 1991
OFFICE OF THE CLERK

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

RONALD PHILBROOK,
Petitioner,

v.

ANSONIA BOARD OF EDUCATION AND NICHOLAS COLLICELLI, DR. CHARLES J. CONNORS, KENNETH EATON, WILLIAM EVANS, DEL MATRICARIA, SUSAN SCHUMACHER, FAITH TINGLEY, AND ROBERT E. ZURAW,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On the Brief:
ROBERT J. MURPHY

13p.

QUESTION PRESENTED

Whether the court of appeals erred in affirming the finding that the leave provisions at issue were a limited purpose leave not administered to provide leave for all purposes except religious ones?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Ronald Philbrook and the respondents Ansonia Board of Education, Nicholas Collicelli, Dr. Charles J. Connors, Kenneth Eaton, William Evans, Del Matricaria, Susan Schumacher, Faith Tingley, and Robert E. Zuraw. Appellees in the court below also included Ansonia Federation of Teachers, Local 1012, AFL-CIO; Jose Neves; Kathleen Roberts; Mary Ghirardini; Dennis Gleason; Dominick Brogolia; Maureen Wilkinson; and Georgette Williams.

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The court of appeals affirmation of the finding of a reasonable accommodation presents neither an important question of law nor an issue over which appellate courts are divided.

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STATEMENT OF THE CASE

Petitioner, Ronald Philbrook, is a teacher employed by the respondent, Ansonia Board of Education. Under the terms of relevant collective bargaining agreements, he has been provided three days of paid leave for religious observance. Philbrook and other teachers employed by the Board of Education also are provided paid leave for other reasons specified in the collective bargaining agreement which may or may not be religious in nature depending upon the personal beliefs of the teacher utilizing the leave. The Board of Education has provided Philbrook unpaid leave for whatever additional days he needs for

religious observance beyond the three days of paid leave provided under the bargaining agreements.

The relevant collective bargaining agreements have provided three days of paid "necessary personal business" leave in addition to the paid leave provided for specified reasons such as religious observance. Petitioner's Appendix (P.A.) at 29a-31a. Under the bargaining agreements, such leave may not be used for any reason for which leave is otherwise provided. Ibid. Philbrook sought to utilize such leave for religious observance but his request was denied under the terms of the agreements.

In Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986), this Court determined that the Board of Education's practice of providing "unpaid leave for holy day observance that exceeded the amount allowed by the collective bargaining agreement, would generally be a reasonable one." 479 U.S. at 70. This Court observed, however, that "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes except religious ones." 479 U.S. at 71 (emphasis in original). Consequently, the case was remanded to the district court to determine whether the "necessary personal business" leave category of the bargaining agreements provided for a "limited purpose leave" or whether that category of leave

constitutes "an open-ended leave provision that may be used for a wide range of secular purposes in addition to those specifically provided for in the contract, but not for similar religious purposes." Ibid.

On remand, the district court issued findings of fact in support of the conclusion that the "necessary personal business" leave provisions of the relevant agreements have been and continue to be administered as written so that teachers are not allowed to use such leave for any reason for which leave is otherwise provided in the agreements. P.A. at 31a. The district court concluded that the school board reasonably accommodated Philbrook's religious beliefs by providing both

paid and unpaid leave. P.A. at 32a, 33a. The decision of the district court was affirmed by the court of appeals.

REASONS FOR DENYING THE WRIT

The court of appeal's affirmation of the finding of a reasonable accommodation presents neither an important question of law nor an issue over which appellate courts are divided.

Philbrook claims that the denial of his request to use "necessary personal business" leave for religious observance is discriminatory because the denial is based upon the religious nature of the request. However, the language of the relevant agreements makes clear that the denial is based

upon the fact that paid leave is otherwise provided for religious observance. More importantly, on remand, Philbrook produced no evidence to show that "necessary personal business" leave is administered so as to allow such leave for reasons for which leave is otherwise provided in the agreements, or that such leave is not restricted to reasons which require a teacher's absence but is allowed for "a wide range of secular purposes in addition to those specifically provided for in the contract, but not for similar religious purposes." 479 U.S. at 71.

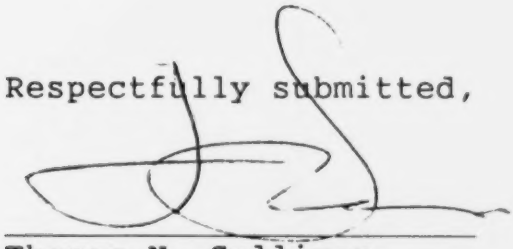
On remand, the district court made two factual findings of significance:

first, the necessary personal business leave has been a "limited purpose leave," and, second, this leave has not been administered so as to provide paid leave for all purposes except religious ones. P.A. at 31a. The court of appeal's affirmation of these findings presents neither an important question of law nor an issue over which appellate courts are divided. See Rule 10.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,



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